Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

Excalibur Group, Inc., a
Minnesota corporation,

Petitioner,

vs.

City of Minneapolis, a
Municipal corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND APPENDIX TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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182 pp

Questions Presented

1. Is an ordinance which prohibits any merchandise or pictures of a product or entertainment sold in an adult bookstore from being visible from the sidewalk and the front of a building, regardless of whether the material is obscene, harmful to minors, or even sexually explicit, unconstitutionally overbroad, in violation of the First and Fourteenth Amendments to the United States Constitution?

2. Is deference to legislative judgment on the issue of the substantiality of a governmental interest served and the question of narrow tailoring, justifying a time, place, and manner regulation, erroneous in light of this Court's decision in 44 Liquormart, v Rhode Island, given the substantial similarity between the test for commercial speech and the test for time, place, and manner regulations?

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Reports of Opinions

The opinion of the U.S. Court of Appeals for the Eighth Circuit is reported at 116 F. 3d 1216 (8th Cir. June 24, 1997). The District Court opinions are unreported.

Jurisdiction

Review is sought of a decision of the United States Court of Appeals for the Eighth Circuit, entered June 24, 1997, for which rehearing was denied on August 20, 1997. Jurisdiction is based upon Title 28 U.S.C. Sec. 1254(1).

Constitutional and Statutory Provisions Involved

This case involves the First and Fourteenth Amendments to the United States Constitution, the text of which is set forth in the Appendix at A61, and Minneapolis Code of Ordinances Sec. 540.410, pertinent portions of which are set forth in the Appendix at A62 - A64.

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Statement of the Case

This is an action brought pursuant to Title 42 U.S.C. Sec. 1983, challenging the facial constitutionality of Minneapolis Code of Ordinances Sec. 540.410(g), regulating signage on adult entertainment uses. Jurisdiction of the District Court was based on Title 28 U.S.C. Sec. 1343(3). The challenged ordinance provides in pertinent, part as follows:

> "All new regulated uses,[1] and all existing regulating uses by December 1, 1988, shall comply with the following sign requirements:
>
> ...(3) No merchandise or pictures of the product or entertainment on the premises shall be displayed in the window area or any area where they can be viewed from the sidewalk in front of the building.
>
> (4) Window areas shall not be covered or

[1]The term "regulated uses" refers to the general adult entertainment uses regulated by Section 540.410, enumerated in subparagraph (A) and more specifically in subparagraph (b) of the ordinance. Regulated uses include adults-only bookstores, adults-only motion picture theaters, massage parlors, rap parlors, saunas, and adult entertainment centers. Appendix at A.62-63.

made opaque in any way. No signs shall be placed in any window. Once square foot sign may be placed on the door to state hours of operation and admittance to adults only."
Appendix at A46.

Several observations are readily apparent from the face of the ordinance:

First of all, if an adult bookstore renders its windows opaque, so as to prevent minors from seeing sexually explicit merchandise inside, the adult bookstore commits a crime under subparagraph (4). If, on the other hand, the adult bookstore obeys Subparagraph (4) by making its windows transparent, and if a person can therefore see merchandise from a sidewalk in front of the building, the store commits a crime under Subparagraph (3).[2]

Secondly, the restriction as to merchandise or

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[2]This is mere speculation or conjuncture. The record before the trial court plainly indicated that the owner of another adult bookstore was, in a single prosecution, criminally prosecuted for making his windows too opaque, by putting a sign in them, and also for not making them opaque enough, since someone looking around the edge of the sign could see merchandise inside the store. See Appendix at 112-A121.

pictures or entertainment being visible from the sidewalk is not limited to material which is legally obscene, harmful to minors, or even sexually explicit.

Finally, it should be noted, that under the plain language of the ordinance, while placing a sign in the window would constitute a criminal offense, placing the identical sign on the wall is absolutely permissible.

The entirety of the legislative history supporting these rather bizarre provisions is the following:

A report of the City Planning Commission, dated September 25, 1986, adopts a report from its staff, dated September 10, 1986, which report justifies the sign restrictions as "design controls" and states that said controls "were included to control the appearance and image of adult businesses";[3] secondly, the minutes of the Standing Committee on Zoning and Planning contain a remark from then Councilwoman Sharon Sayles Belton, who stated that the Planning Commission's version of the ordinance "added design standards for prohibition of signs on Nicollet Mall...."[4] thirdly, a memorandum to Council

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[3] Appendix at A.104.

[4] Id. at A49.

member Sayles-Belton and to Council member Tony Scallon, the authors of the ordinance, from James H. Heltzer, former Executive Director of the Minneapolis Community Development Agency, dated September 30, 1986, which contains the following assessment of the sign regulation:

> "We further questioned the signage regulations for adult entertainment facilities only. Given the City's desire for neon and bright lights as expressed in the Hennepin Avenue RFP, it would appear that the provision limiting the size and location of signs is impermissibly aimed at the content of these signs, although the planning staff acknowledges there is precedent in the zoning code for this type of regulation."[5]

Finally, a letter to Sayles Belton from Allen Hyatt, the Assistant City Attorney who drafted the ordinance, contains the following remarks concerning the sign restriction:

> "Although Renton did not address design standards, other cases have and I believe designs standards of the proposed ordinance meet constitutional standards although it

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[5] Id. at A.110.

> may be necessary to 'fine-tune' prior to the effective date of the ordinance."[6]

Conspicuous by its absence from this legislative history is any showing or discussion, much less affirmative evidence, that opaque windows in adult bookstores cause adverse secondary effects not caused by opaque windows in a B. Dalton Bookstore, or that any adverse secondary effects are caused by signs placed in windows of adult bookstores that are not caused by the identical signs placed on a wall.

The facial validity of these provisions was upheld by the United States District Court for the District of Minnesota[7] and by the United State Court of Appeals for the Eighth Circuit.[8]

ARGUMENT

I. THE EIGHTH CIRCUIT'S DEFERENCE TO LEGISLATIVE JUDGMENT ON THE NARROW TAILORING REQUIREMENT IN A TIME, PLACE, AND

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[6] Id. at A.150.

[7] The memorandum of the District Court is set forth in the Appendix at A31-A43.

[8] A copy of the Eighth Circuit Opinion is set forth in the Appendix at A1-A30 and reported at 116 F. 3d 1216.

MANNER REGULATION IS INCONSISTENT WITH THIS COURT'S DECISION IN 44 LIQUORMART V. RHODE ISLAND, GIVEN THE SUBSTANTIAL SIMILARITY BETWEEN THE TESTS FOR REGULATION OF COMMERCIAL SPEECH AND FOR TIME, PLACE, AND MANNER REGULATION.

In City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 52 (1986), this Court upheld Renton's ordinance zoning adult theaters, defined solely on the basis of the content of the motion picture films shown therein, only upon a showing that the regulations were "narrowly tailored" to "affect only that category of theaters shown to produce unwanted secondary effects," such as the lowering of property value and an increase in crime in the surrounding neighborhood.

In Ward v. Rock Against Racism, 491 U.S. 781 (1989), this Court held that the "narrow tailoring" is a requirement of any content-neutral time, place, and manner regulation of speech. In that case, this Court pointed out that to be constitutionally valid, a time, place, and manner regulation must be narrowly tailored so as not to restrict speech to a greater extent than is necessary to support a substantial governmental interest. To be sure, this Court rejected the notion that this final prong of the test meant the government must choose the "least

restrictive alternative." However, this Court did state the following:

> "[T]he requirement of narrowly tailoring is satisfied 'so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' [Citations omitted.] To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interest. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. [Citation omitted.] So long as the means chosen are not substantially broader than necessary to achieve the government's interests, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." Id. at 798.

The United States Supreme Court elaborated further on the narrow tailoring requirement in Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S.105 (1991), when it noted:

> "Even under Ward and Renton, however, regulations must be 'narrowly tailored' to advance the interest asserted by the State.

> [Citations omitted.] A regulation is not 'narrowly tailored' -- even under the more lenient tailoring standards applied in Ward and Renton -- where, as here, 'a substantial portion of the burden on speech does not serve to advance [the State's content-neutral] goals.' [Citation omitted]" Id. at 122, n.

Judged by this standard, the total failure of Sec. 540.410(g)(4) to satisfy the narrow tailoring test is obvious. To begin with, the record is absolutely devoid of any suggestion, much less evidence, that prohibited signs and windows, to-wit: opaque windows in adult bookstores, and adult bookstores containing signs in windows, cause adverse secondary effects not caused by permitted signs in windows, to-wit: B. Dalton Bookseller with opaque windows and an adult bookstore which places its signs on walls instead of windows.[9]

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[9]Indeed, the Eighth Circuit's decision in the instant case is plainly inconsistent with its earlier decision in Gilleo v. LaDue, 986 F. 2d 1180, 1183 (8th Cir. 1993), aff'd, 114 S. Ct. 2038 (1994), in which the Eighth Circuit rejected a "secondary effects" analysis to justify restrictions on political signs because the City had set forth no evidence to show that prohibited signs (political signs) caused any adverse secondary effects in terms of aesthetics, safety, and property values than did permitted signs (commercial signs).

In reaching the result it did the Eighth Circuit stated:

> "We disagree that the sign and window restrictions are unreasonable. The City could reasonably have concluded that leaving the windows free of signs and coverings would enhance the outward appearance of, and therefore minimize the adverse effects caused by, sexually oriented businesses. Further, the City's regulations are not inconsistent, because Excalibur could avoid the visibility of its merchandise through unobstructed windows by turning its display stands so the merchandise does not face the windows (footnote omitted). More importantly, and to the point, we believe Excalibur invites us to strike down the City's means of furthering its objections, simply because the means may be imperfect. We decline this invitation. Although reasonable people might quibble about the extent to which the regulation serves the City's significant interest, or whether a better solution might be available, Section 540.410(g)(4) is reasonably related to the City's significant objectives, and therefore, 'narrowly tailored' as that term of art is used in this context. [Citation omitted.]" Appendix at A18-A19, 116 F. 3d at 222.

Contrary to the Eighth Circuit's opinion, this is simply not a matter of the regulation being "imperfect"; it is a matter of the City's total failure to make any showing

that the regulation would have any effect on its stated goals whatsoever. What adverse secondary effects, aesthetic, or otherwise, are caused by an adult bookstore placing a sign in its windows that are not caused by an adult bookstore placing the identical sign on its walls? Neither Respondent, the Eighth Circuit, nor the record before either contains the slightest hint of an answer. What adverse secondary effects, aesthetic or otherwise, are caused by an adult bookstore which contains opaque windows that are not caused by a B. Dalton Bookstore which contains the same opaque windows? Again, Respondent, the Eighth Circuit, are silent on this question.

Most absurd of all is the Eighth Circuit's assertion that a bookstore could comply with a prohibition against both opaque and transparent windows by taking a bookshelf and backing it up against the window. Unexplained by either Respondent or the Eighth Circuit is how the aesthetics of a bookstore are improved by having windows which feature nothing more than the back side of a bookshelf, as opposed to a store with windows tastefully painted opaque, or with signs therein.

Implicit in the Eighth Circuit's holding is the

unstated assumption that when municipalities enact purported time, place and manner regulations on speech, courts are automatically to defer to legislative judgment without question. This unstated assumption is absolutely inconsistent with numerous decisions of this Court, other federal circuits and state courts of last resort.

The assumption is plainly inconsistent with this Court's recent decisions concerning the regulation of commercial speech, in which the test applied is virtually identical to that applied in a time, place and manner regulation of non-commercial speech.[10]

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[10] Compare Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y., 447 U.S. 557 (1980), permitting regulation of commercial speech provided that the speech concerned lawful activity and not be misleading, that the governmental interest at stake be substantial, that the regulation directly advance the governmental interest asserted, and that the regulation not be more extensive than necessary to serve that interest, with City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, (1986), and Ward v. Rock Against Racism, supra 491 U.S. 781, supra (1989), permitting time, place, and manner regulation upon a showing that the regulation is justified without reference to the content of regulated speech, that the regulation is narrowly tailored to serve a substantial governmental interest, and that the regulation leave available ample alternative avenues of communication.

For example, in Rubin v. Coors Brewing Co., 115 S.Ct. 1535 (1995), this Court discussed its earlier decision in Edenfeld v. Fane, 507 U.S. 761 (1993), and stated the following:

> "In Edenfeld, [Citation omitted.], we decided that the government carries the burden of showing that the challenged regulation advances the Government's interest 'in a direct and material way' [Citation omitted.] That burden 'is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' [Citation omitted.] We cautioned that this requirement was critical; otherwise 'a state could with ease restrict commercial speech in the service of objectives that could not themselves justify a burden on commercial expression.' [Citation omitted.]"

More recently, in 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495 (1995) this Court considered the application of the long-standing test for judging the validity of a government regulation of commercial speech, a test virtually identical to the test adopted for judging the sufficiency of a time, place, and manner regulation of non-

commercial speech, such as adult entertainment, under Renton. As was the case in Renton and its progeny, the United States Supreme Court had long held that courts were to defer to legislative judgment as to the substantiality of the governmental interest and whether the regulation was narrowly tailored to serve those interests. See, for example, Posadas de Puerto Rico Associates v. Tours and Co. of P.R., 478 U.S. 328 (1986). However, in 44 Liquormart, this Court expressly overruled Posadas, to the extent that it required courts to defer to legislative determination as to the substantiality of a governmental interest and on the issue of narrow tailoring. The plurality opinion, written by Justice Stevens, stated the following:

> "The reasoning in Posadas does support the State's argument, but, on reflection, we are now persuaded that Posadas erroneously performed the First Amendment analysis. The casino advertising ban was designed to keep truthful, non-misleading speech from members of the public for fear they would be more likely to gamble if they received it. As a result, the advertising ban served to shield the State's anti-gambling policy from public scrutiny that more direct, non-speech regulation would draw. [Citation omitted.]

> Given our long standing hostility to commercial speech regulation of this type, Posadas clearly erred in concluding that it was 'up to the legislature' to choose suppression over a less speech-restrictive policy. The Posadas majority's conclusion on that point cannot be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, non-misleading advertising when non-speech related alternatives were available. [Citations omitted.]
>
> Because the 5-to-4 decision in Posadas marked such a sharp break from our prior precedent, and because it concerned a constitutional question about which this Court is to be the final arbiter, we decline to give force to its highly deferential approach. Id. at 1511.

In her concurring opinion, joined in by three other justices, Justice O'Connor likewise rejected, for commercial speech cases, the Posadas conclusion that courts were required to defer to legislative judgment on the issue of the substantiality of the governmental interest, whether the regulation advanced that interest, and whether the regulation was narrowly tailored to serve that interest. Justice O'Connor's concurring opinion stated:

"Respondents point for support to Posadas

de Puerto Rico Associates v. Tours and Co. of P.R., [Citation omitted], where, applying the Central Hudson test, we upheld the constitutionality of a Puerto Rico law that prohibited the advertising of casino gambling aimed at residents of Puerto Rico, but permitted such advertising aimed at tourists.

The Court there accepted as reasonable the legislature's belief that the regulation would be effective, and concluded that, because the restriction affected only advertising of casino gambling aimed at residents of Puerto Rico, not that aimed at tourists, the restriction was narrowly tailored to serve Puerto Rico's interest. [Citation omitted.] The Court accepted without question Puerto Rico's account of the effectiveness and reasonableness of its speech restriction. Respondents ask us to make a similar presumption here to uphold the validity of Rhode Island's law.

It is true that Posadas accepted as reasonable, without further inquiry, Puerto Rico's assertions that the regulations further the government's interest and were no more extensive than necessary to serve that interest. Since Posadas, however, this Court has examined more searchingly the state's professed goal, and the speech restriction put into place to further it, before accepting a state's claim that the speech restriction

> satisfies First Amendment scrutiny. [Citations omitted.] In each of these cases, we declined to accept at face value the proffered justification for the State's regulation, but carefully examined the relationship between the asserted goal and the speech restriction used to reach that goal. The closer look that we have required since Posadas comports better with the purpose of the analysis set out in Central Hudson, by requiring the State to show that the speech restriction directly advances its interest and is narrowly tailored. Under such a closer look, Rhode Island's price-advertising ban clearly fails to pass muster." Id. at 1522, O'Connor, J. concurring.

Consequently, since 44 Liquormart, this Court, whether under the Stevens plurality opinion, or the O'Connor concurrence, has now said it will "carefully examine" the substantiality of a governmental interest, the evidence relied upon by the government to establish that the regulation substantially advances that interest, and the assertion that the regulation is narrowly tailored to serve that interest.

Plainly, under this heightened level of judicial scrutiny, the virtually non-existent showing contained in the instant case that the regulations involved will in any way advance any type of substantial governmental interest,

cannot conceivably pass constitutional muster.

Likewise, courts in other circuits, as well as highest state courts of last resort, have plainly held, that in time, place, and manner regulations, especially regulations of adult entertainment, the failure of municipality to produce any substantial evidence with respect to secondary effects calls for invalidation of the regulation. See. for example. Philips v. Borough of Keyport, 107 F. 3d 164 (3d Cir. Feb. 21, 1997); Tollis v. San Bernardino County, 827 F. 2d 1329 (9th Cir. 1987); Kruger v. City of Pennsacola, 759 F. 2d 851 (11th Cir. 1985); and Chambers v. Peach County, 266 Ga. 318 (1996).

II. THE EIGHTH CIRCUIT'S DECISION UPHOLDING THE DISPLAY PROVISION AGAINST AN OVERBREADTH CHALLENGE IS DIRECTLY CONTRARY TO NUMEROUS DECISIONS OF THIS COURT AND SHOULD BE CORRECTED.

As already noted supra, Minneapolis Code of Ordinance Sec. 540.410(g)(3) prohibits any material and display at an adult bookstore from being visible from the sidewalk adjacent to the store.[11] What is significant in

[11]Of course, as already noted, supra if a store owner wishes to avoid criminal prosecution, by making his store windows opaque, it will result in his criminal prosecution under subparagraph (4) of the ordinance, which prohibits

this regard is that if any merchandise available in the store is visible, the store is subject to prosecution, regardless of whether the material in question is obscene, harmful to minors or even sexually explicit. Sec. 540.410(b) defines the term "adults only bookstore" as one having a "substantial or significant portion of its stock and trade" in sexually explicit materials or as one having a "segment or section devoted to the sale or display of such material, for sale to patrons therein." Appendix at A63. In ILQ Investments v. City of Rochester, 25 F. 3d 1413 (8th Cir. 1994), cert. denied, 115 S. Ct. 578 (1994), the Eighth Circuit held that an establishment with as little as 40% of its stock in trade in sexually explicit materials nonetheless had a "substantial or significant" portion of its stock in trade in sexually explicit material and thus qualified as an adult bookstore. Consequently, the ordinance, on its face, permits the prosecution of an adult bookstore for the display of the Holy Bible or the Wall Street Journal in its window, so long as little as 40% of the other materials it sells are sexually explicit or that sexually explicit materials are set forth in a separate segment or section of the store.

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opaque windows.

Plainly such a regulation is unconstitutionally overbroad under the decision of this Court in Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).[12] The Eighth Circuit avoided this clearly mandated result by asserting that the Minnesota Court of Appeals in State v. Holmberg, 545 N.W. 2d 65, 70 (Minn. App. 1996), authoritatively construed the term to be limited to commercial speech and sexually explicit speech, which are entitled to a lesser measure of constitutional protection. Appendix at A26-A27.

There are three fundamental flaws with the argument:

Even apart from the fact that federal courts lack the authority to construe state statutes or city ordinances to preserve their constitutionality,[13] and apart from the

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[12]In Erznoznik, this Court invalidated a city ordinance prohibiting the display of even "nudity" at a drive-in theater. If a regulation prohibiting the public display of mere nudity is unconstitutionality overbroad, then certainly one that prohibits the display of any merchandise sold in an adult bookstore, regardless of its level of explicitness, is, if anything, even far more overbroad.

[13]See United States v. 12 200-foot Reels, 413 U.S. 123 (1973).

fact that nothing in the Holmberg decision supports such a purported "narrowing construction,"[14] such a construction could not salvage the statute from an overbreadth challenge.

First of all, to the extent that the Minnesota Court of Appeals in Holmberg and the panel dismissed the restriction as one directed to "commercial" speech, it is directly contrary to at least two decisions of this Court. The ordinance focuses on the display of "merchandise or pictures of the product or entertainment on the premises." Thus it focuses not on speech which proposes a commercial transaction but upon the fact that the books, magazines, and video tapes are displayed publicly for sale. This Court has repeatedly held that the fact that otherwise constitutionally protected material, such as books, magazines, and films are available for sale does not convert them into "commercial speech." In New York

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[14]The panel relies upon the court's language at 545 N.W. 2d at 70, in which it dismisses the overbreadth challenge by asserting that commercial speech and sexually explicit speech are entitled to a lesser measure of constitutional protection than is other speech. However, nowhere in that discussion does the Minnesota Court of Appeals authoritatively construe the statute in such a limiting manner.

Times, Co. v. Sullivan, 376 U.S. 254 (1964), this Court held that a paid political advertisement was not "commercial speech," stating, "That the Times was paid for publishing the advertisement is immaterial in this connection as is the fact that newspapers and books are sold." In doing so, this Court relied upon its earlier decision in Smith v. California, 361 U.S. 147 (1960), an obscenity prosecution directly involving sexually explicit speech. In that case, this Court stated, "It is of course no matter that the dissemination takes place under commercial auspices. [Citation omitted.] Certainly, a retail bookseller plays a most significant role in the process of distribution of books." Id. at 150

Consequently, to the extent that the prohibition affects display of merchandise otherwise available for sale, a commercial speech analysis is plainly inappropriate under the controlling decisions of this Court.

Secondly, even a restriction of the applicability of the ordinance to "sexually explicit" speech would nonetheless be unconstitutionally overbroad. Plainly "sexually explicit" speech may involve mere nudity, something plainly entitled to constitutional protection, even in a display context. See Erznoznik, supra, and

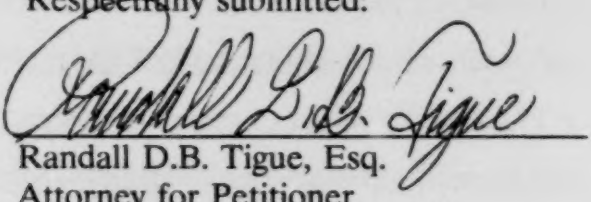
Jenkins v. Georgia, 418 U.S. 153, 181 (1974). Plainly, in order to pass constitutional muster, any prohibition against the display of sexually explicit material must, as a matter of law, be restricted to material which is legally obscene under Miller v. California, 413 U.S. 15 (1973), or "harmful to minors," under Ginsberg v. New York, 390 U.S. 629 (1968), and Upper Midwest Bookseller's Association v. City of Minneapolis, 780 F. 2d 1389 (8th Cir. 1989).

Finally, it should be noted that a construction of the ordinance narrowing it to material deemed "harmful to minors" would plainly be inconsistent with the legislative intent. At the time the provision was enacted in 1986, display of material deemed "harmful to minors" was already prohibited under the very ordinance upheld in Upper Midwest Booksellers, supra. Consequently, it is clear that the City Council, in enacting Section 540.410(g)(3) plainly intended to go beyond that ordinance in enacting the present prohibition.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be, in all respects, granted.

Respectfully submitted:



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Dated: November 14, 1997

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-1098

Excalibur Group, Inc., a Minnesota corporation,	*	
Plaintiff-Appellant,	*	Appeal from the United States District Court for the District of Minnesota
v.	*	
City of Minneapolis,	*	
Defendant-Appellee.	*	

Submitted: November 20, 1996

Filed: June 24, 1997

Before FAGG, WOLLMAN, AND HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

The Excalibur Group, Inc., (Excalibur) operates an adult bookstore, Sex World, in downtown Minneapolis, Minnesota. Excalibur brought this action, seeking declaratory and injunctive relief on the basis that certain portions of Minneapolis Code of Ordinances § 540.410, which regulates

adults-only businesses, are unconstitutional under the First and Fourteenth Amendments of the United States Constitution. The District Court[1] granted summary judgment to the City of Minneapolis, and we affirm.

I.

A. General Background of Section 540.410

Over twenty years ago, the City of Minneapolis (the city) enacted Minneapolis Code of Ordinances § 540.410, a zoning ordinance regulating adults-only businesses. In 1986, the city amended the ordinance for the third time, adding the provisions challenged in this case. The creation of Section 540.410 and its amendments involved the sensitive balancing of the adults-only businesses' interest in free speech with the city's interest in minimizing the adverse secondary effects caused by those businesses. In the process of enacting the 1986 amendment, the city held several public hearings, giving citizens, business owners, civic leaders, and community

[1]The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

organizations an opportunity to voice their opinions about the ordinance.

In addition to conducting the hearings, the city directed its Planning Department Staff (the staff) to study various empirical studies of other cities regarding the effects of adults-only businesses on their surrounding areas.[2] The Indianapolis study, the results of which were similar to those in the other studies, found that adults-only businesses adversely impacted the areas surrounding adult-only businesses in numerous ways. The incidence of major crimes in surrounding areas was 23 percent higher than in other areas, and sex-related crimes occurred almost twice as often. Housing values appreciated at only half the rate as values in other areas of the city, and property turnover was substantially higher. The evidence of theses and other deleterious effects, as well as the testimony received at the hearings, convinced the staff that the downtown

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[2]The staff looked at studies performed in Seattle, Washington; Chicago, Illinois; Los Angeles, California; Indianapolis, Indiana; and Portland, Oregon. (Appellant's App. at 85.)

area in Minneapolis was best able to "buffer" the impact of adult businesses on surrounding neighborhoods. The staff recommended enacting the proposed amendment to "control the adverse impacts on residentially zoned areas and the City's fragile strip and neighborhood commercial areas." (Appellant's App. at 85.)

In addition to the restrictions on location, the staff proposed an amendment regulating the signs identifying the adults-only businesses and prohibiting the display of their merchandise in a manner that would be visible from the sidewalk in front of the establishments. The staff felt that controlling the appearance and image of the sexually oriented business would make the locational restrictions more effective in minimizing the blighting impact of adults-only businesses.

The staff's findings and recommendations were adopted by the Minneapolis City Planning Commission, and the city ultimately enacted the proposed amendments. Subsection (a) of the amended ordinance states the city's objectives for the restrictions found therein:

> In the development and execution of this section, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the use and enjoyment of adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood...The primary control or regulation is for the purpose of preventing a concentration of these uses in any one area.

Minneapolis, Minn., Code of Ordinances § 540.410(a).

It was not long before the locational restrictions in the ordinance were challenged as unconstitutional abridgments on speech. We upheld those restrictions, finding them to be permissible regulations on the time, place and manner of the adults-only businesses' speech. Alexander v. City of Minneapolis, 928 F.2d 278, 283-84 (8th Cir. 1991).

We now address a constitutional challenge to the sign requirements, which are codified in subsection (g) of the ordinance:

> (g) Sign requirement for all uses. All new regulated

uses, and all existing regulated uses by December 1, 1988, shall comply with the following sign requirements:

> (1) All signs shall be flat wall signs.
>
> (2) The amount of allowable sign area shall be one square foot of sign area per foot of lot frontage on a street.
>
> (3) No merchandise or pictures of the products or entertainment on the premises shall be displayed in window areas or any area where they can be viewed from the sidewalk in front of the building.
>
> (4) Window areas shall not be covered or made opaque in any way. No signs shall be placed in any window. A one-square-foot sign may be placed on the door to state hours of operation and admittance to adults only.

Minneapolis, Minn., Code of Ordinances § 540.410(g). Excalibur contends that subsection (g)(3) is overbroad and subsection (g)(4) is unconstitutional on its face and as applied to Excalibur.

B. Procedural Background

After receiving notification from the city zoning inspector that it was in violation of subsections (g)(3) and (g)(4), Excalibur brought this declaratory judgment action in federal court, arguing that subsection (g)(4) of the above ordinance is facially unconstitutional and unconstitutional as

applied to Excalibur.[3] Excalibur then filed a motion seeking a temporary restraining order and a preliminary injunction. After conducting a hearing, the District Court denied Excalibur's motion, concluding Excalibur was unlikely to succeed on the merits of its claim.

Subsequently, the city filed criminal charges against Dennis Buchanan, who operates Sex World, and the owner of another adult bookstore for violations of sections 541.410 (g)(3) and (g)(4). The defendants were found guilty as charged, and the Minnesota Court of Appeals affirmed the convictions. See State v. Holmberg, 545 N.W. 2d 65, 74 (Minn. Ct. App. 1996).

While the criminal case was still pending, however, the city brought a motion for summary judgment on the merits of the declaratory judgment action. In Excalibur's memorandum

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[3]Excalibur also challenged the constitutionality of § 34.60(a)(1) of the Minneapolis Code of Ordinances, which requires approval from the Heritage Preservation Commission prior to the placement of signs on certain buildings. The district court held that this ordinance is not applicable to window signs and that Excalibur had no meritorious First Amendment claim against the ordinance. The parties do not appeal that holding.

in opposition to the city's motion, Excalibur argued the claims submitted in its original complaint, as well as an additional claim that section 540.410 (g)(3) is unconstitutionally overbroad. The District Court addressed all of Excalibur's claims, found them lacking in merit, and granted the city's motion for summary judgment. The appeal followed.

II.

We review the District Court's grant of summary judgment de novo, using the same standard under Federal Rule of Civil Procedure 56(c) as applied by the District Court. Toney v. WCCO Television, Midwest Cable & Satellite, Inc., 85 F. 3d 383, 386 (8th Cir. 1996). Under Rule 56(c), summary judgment is warranted when "there is no genuine issue as to any material fact and...the moving party is entitled to judgment as a matter of law". Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 233-23 (1986).

The material facts in this case are undisputed. Further, the parties agree that Sex World is an adults-only bookstore and therefore subject to the regulations in section 540.541. See

Minneapolis, Minn., Code of Ordinances § 540.410(a),(b)(1). The parties also agree that Excalibur is entitled to free-speech protections under the First and Fourteenth Amendments. See Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 65-66 (1981) (recognizing First Amendment protection for sexually explicit speech that is not "obscene"); 44 Liquormart, Inc., v. Rhode Island, 116 S. Ct. 1495, 1515 (1996) (noting that the First Amendment extends First Amendment protection to state and local levels). Thus, we limit our inquiry to the legal question of whether the challenged portions of the ordinance are unconstitutional restrictions on free speech.

A. Section 540.410(g)(4)

Excalibur contends that section 540.410(g)(4) unconstitutionally infringes on Excalibur's First Amendment rights. Because the ordinance does not create an absolute ban on speech, it is "properly analyzed as a form of time, place, and manner regulation" ILQ Invs., Inc. v. City of Rochester, 25 F. 3d 1413, 1416 (8th Cir.) (quoting City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46 (1986)), cert. denied, 513 U.S.

1017 (1994). Time, place and manner regulations are constitutional under First Amendment jurisprudence if (1) they "are justified without reference to the content of the regulated speech," (2) "they are narrowly tailored to serve a significant governmental interest," and (3) "they leave open ample alternative channels for communications of the information" Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989 (internal quotations omitted).

We first consider whether section 540.410(g)(4) is content-neutral. A regulation is content-neutral if it is "justified without reference to the content of the regulated speech" Id. (emphasis and internal quotations omitted). Such a regulation is neutral "even if it has an incidental effect on some speakers or messages but not others." Id. (citing Renton, 475 U.S. at 47-48. Thus, at this point in te analysis, we focus on the city's purpose for enacting the ordinance. Id.; ILQ Invs., Inc., 25 F. 3d at 1416.

The purpose statement in section 540.410(a) indicates that the city enacted the ordinance to minimize the adverse

impacts of the sexually oriented businesses on the surrounding areas. Specifically, the city recognized that "serious objectionable operational characteristics [of sexually oriented businesses have] a deleterious effect upon the use and enjoyment of adjacent areas" and enacted section 540.410 "to ensure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood." Minneapolis, Minn., Code of Ordinances § 540.541(a). This purpose of eliminating "secondary effects" that are unrelated to the content of the restricted speech renders section 540.410 a content-neautral ordinance. See Renton, 475 U.S. at 47-48. Cf. Alexander, 928 F. 2d at 282-83 (assuming section 540.410 was content-neautral and noting that the plaintiff was not appealing the district court's decision reaching this conclusion).

Excalibur argues that the secondary-effects justification for section 540.410 applies only to the locational restrictions in the ordinance, not to the sign requirements in subsection (g)(4) of the ordinance. We reject this argument, because the purpose statement in subsection (a) is clearly intended to

explain the basis for all of the provisions in the ordinance. While the purpose statement specifically notes that the ordinance seeks to prevent a concentration of adults-only businesses in any one area, the concern about the adverse impacts of the adults-only businesses and the intent to minimize those impacts applies to all of the substantive provision of section 540.410.

Excalibur also contends the legislative history of the ordinance does not support the city's claim that the purpose of the sign restrictions was to minimize secondary effects. Relying on a report made by the staff of the City Planning Commission and adopted by the Commission, Excalibur argues the city was merely trying to further aesthetic objectives by creating the sign restrictions. See Ward, 491 U.S. at 793 (noting that regulation to further purely aesthetic goals would "raise serious First Amendment concerns"). The report reads: "The Downtown is best able to buffer' the impact of adult uses on surrounding properties. This would be even more effective if design controls were included to control the appearance and image of

adult businesses." (Appellee's App. at A21). While this report indicates that the city aimed the sign requirements at the outward appearance of the adults-only businesses, this regulation was a legitimate means to serve the city's overall secondary-effects objective -- Minimizing the adverse effects these businesses have on surrounding areas. The city's secondary-effects justification is unrelated to the content of any signs, and the sign regulation has no content restrictions. Section 540.410(g)(4) is therefore a content-neutral regulation.

We next consider whether subsection (g)(4) was "narrowly tailored to serve a significant governmental interest." Ward, 491 U.S. at 791; see also Renton, 475 U.S. at 50; ILQ Invs., Inc., 25 F. 3d at 1416; Holmberg v. City of Ramsey, 12 F. 3d 140, 143 (8th Cir. 1993), cert. denied, 513 U.S. 810 (1994); see also Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976) (plurality opinion) ("[T]he city's interest in attempting to preserve the quality of life is one that must be accorded high respect."). Furthermore, this record, which includes studies of several cities and evidence obtained at the hearings held by the

City of Minneapolis, indicates that the city had substantial evidence on which to base its conclusions about the secondary effects of adults-only businesses. See Turner Broad Sys., Inc. v. FCC, 512 U.S. 622, 665-66 (1994 (explaining that legislative predictive judgments are entitled to deference in the First Amendment context of content-neutral regulation as long as the conclusions are "reasonable inferences based on substantial evidence"); Renton, 475 U.S. at 51-52 ("The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses"). The issue thus narrows to whether the sign restrictions in subsection (g)(4) are themselves narrowly tailored to serve the city's significant interest.

To be "narrowly tailored" in the context, the regulation need not be the least restrictive means of serving the city's content-neutral interest. Ward, 491 U.S. at 797; Van Bergen v. Minnesota, 59 F. 2d 1541, 1555 n.13 (8th Cir. 1995). "[T]he

requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial interest that would be achieved less effectively absent the regulation" and the means chosen does not "burden substantially more speech than is necessary to further" the city's content-neutral interest. Ward, 491 U.S. at 799 (internal quotations omitted); see also Turner Broad, Inc. v. FCC, 117 S. Ct. 1174, 1186 (1997) (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)). "[T]he validity of the regulation depends on the relation it bears to the overall problem the [city's] interests in an individual case." Ward, 491 U.S. at 801. We will not strike down a time, place, or manner regulation merely because we can envision a less-restrictive or more effective means of furthering the city's content-neutral objectives. Ward, 491 U.S. at 800.

The city sought to minimize the blighting caused by adult-only businesses in two ways. First, the city required the adults-only businesses to operate within a specifically zoned area in downtown Minneapolis, the area "best able to buffer' the impact of adult uses on surrounding properties."

(Appellee's App. at A21). Second, the city attempted to minimize the visual impact of the businesses on the neighborhood by regulating the signs on the businesses' premises. This second remedy stemmed from a belief that the locational limitations would "be even more effective if design controls were included to control the appearance and image of adult businesses." (Id.)

The design controls that Excalibur challenges impose some modest restrictions on the external appearance of adults-only businesses. See Minneapolis, Minn., Code of Ordinances § 540.410 (g)(4). Window areas may not be covered or made opague, nor are signs permitted in the windows. Id. A one square-foot sign is allowed on the door, however. Id. subsection (g)(4) works in conjunction with subsection (g)(1), which provides that all exterior signs must be flat wall signs, and subsection (g)(2), which allows one square foot of sign area per foot of lot frontage on a street. Together, these provision control the outward appearance of adults-only businesses.

We hold that the restrictions in subsection (g)(4) are

narrowly tailored to further the city's significant interest in alleviating the adverse impact of sexually oriented businesses on their neighborhoods. Having before it substantial evidence of the urban blight caused by the mere presence of these businesses, the city could reasonably conclude that controlling their outward appearance would lessen the effect they would have on surrounding commercial and residential neighborhoods. The city could also reasonably conclude that sign and window regulations would be an appropriate means by which to achieve this purpose. See Young, 427 U.S. at 71 (noting that a "city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems"). The sign and window restrictions do not reach substantially more speech than necessary, for they are directed only at the signs and window coverings that would affect the outward appearance of the business and impact the surrounding neighborhoods. See Ward, 491 U.S. at 799 n.7 (explaining that a regulation is narrowly tailored when its focus on the evils sought to be eliminated does not "restrict[] a substantial quantity of speech

that does not create the same evils").

Excalibur challenges the reasonableness of the restrictions contained in subsection (g)(4) on several grounds. Excalibur claims that it is unreasonable to prohibit window signs in favor of signs on a wall. Further, Excalibur claims that subsection (g)(4)'s prohibition of covered or opaque windows is inconsistent with subsection (g)(3)'s requirements that displays of merchandise or entertainment not be visible from the sidewalk.

We disagree that the sign and window restrictions are unreasonable. The city could reasonably have concluded that leaving the windows free of signs and coverings would enhance the outward appearance of, and therefore minimize the adverse effects caused by, sexually oriented businesses. Further the city's regulations are not inconsistent, because Excalibur could avoid the visibility of its merchandise through unobstructed windows by turning its display stands so the merchandise does

not face the windows.[4] More importantly and to the point, we believe Excalibur invites us to strike down the city's means of furthering its objectives simply because the means may be imperfect. We decline this invitation. Although reasonable people might quibble about the extent to which the regulations serve the city's significant interests or about whether a better solution might be available, section 540.410 (g)(4) is reasonably related to the city's significant objectives, and therefore "narrowly tailored" as that term of art is used in this context. Ward, 491 U.S. at 800.

We have reviewed the cases Excalibur cites to support its claim and find them to be inapposite, because the

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[4]At oral argument, the city explained that Excalibur operated by Dennis Buchanan) could comply with both the display regulations in subsection (g)(3) and the requirement to leave windows unobstructed by signs or covers by placing the backside of a bookshelf against a window. Dennis Buchanan, who operated Excalibur, was aware of this means of compliance, because he was present when the city inspector mentioned this to Buchanan's brother, who also operated an adults-only bookstore in Minneapolis. Holmberg, 545 N.W. 2d at 73.

regulations in them limit or ban speech based upon its content. See e.g., Boos v. Barry, 485 U.S. 312, 239 (1988) (invalidating, as an impermissible content-based regulation, an ordinance prohibiting speech that was critical of certain foreign governments); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 515 (1981) (invalidating a sign ordinance banning certain signs by reference to their noncommercial content, but allowing signs expressing other noncommercial and commercial speech); Limmark Assocs. Inc. v. Township of Willingboro, 431 U.S. 85, 93-97 (1977) (invalidating a prohibition on "for sale" signs as a content-based regulation, because the purpose of the prohibition was to prevent people acting upon its content); Gilleo v. City of Ladue, 986 F. 2d 1180, 1182-83 (8th Cir. 1993), (invalidating a sign regulation that disfavored certain types of noncommercial speech and rejecting a secondary-effects argument because the city made no showing that the prohibited signs caused any more problems that the permitted signs) aff'd, 512 U.S. 43 (1994); Goward v. City of Minneapolis, 456 N.W. 2d 460, 465-66 (Minn. Ct. App. 1990) (invalidating an

ordinance that banned signs expressing political views but allowed "for rent" signs, "for sale" signs, and campaign-related signs). Here, however, we are looking at a content-neutral governmental interest in limiting adverse secondary effects. The sign and window requirements are reasonably related to the city's significant governmental interest in minimizing urban blight. Cf. SDJ, Inc. v. City of Houston, 837 F. 2d 1268 (5th Cir. 1988) (holding that controls on the outward appearance of adults-only bookstores were content-neutral regulations narrowly tailored to serve significant governmental interests), cert. denied, M.E.F. Enters., Inc. v. City of Houston, 489 U.S. 1052 (1989).

Finally, we believe section 540.410 leaves open ample alternative avenues of communication. Excalibur is free to communicate information on signs outside of its building, within the modest restrictions imposed under subsection (g). The regulation provides for a sign on the door and allows flat signs on the wall of the building, with only some reasonable limitations on their size. These alternative avenues of

communication provide ample opportunity for Excalibur to express itself. In addition, Excalibur may communicate information inside the store, limited only in that merchandise may not be visible from the sidewalk on the street.

Having found that Minneapolis Code of Ordinances § 540.410 (g)(4) is content-neutral, narrowly tailored to further a significant governmental interest but also permissive enough to leave open alternative channels of communication, we hold that the ordinance is a constitutional regulation of the time, place, and manner of speech.

B. Section 540.410 (g)(3)

Excalibur mounts a facial challenge to Minneapolis Code of Ordinances § 540.410 (g)(3), which prohibits the display of merchandise or pictures in window areas or any other area that is visible from the sidewalk in front of the adults-only businesses. Excalibur claims this provision is unconstitutionally

overbroad.[5]

The overbreadth doctrine applies in the narrow context of facial challenges to legislation based upon free-speech rights. This doctrine represents a departure from traditional standing rules, see Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (articulating the standing requirements), and allows a party like Excalibur to challenge an ordinance on the ground that the ordinance might be applied unconstitutionally to third parties whose actual circumstances are not before the court

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[5]The city claims that Excalibur's overbreadth challenge to section 5410.410 (g)(3) is not properly before this court. Excalibur did not include its claim regarding subsection (g)(3) in its complaint and first briefed the issue in opposition to the city's motion for summary judgment. We believe the issue is properly before us, however, because the District Court, apparently believing that the parties had impliedly consented to include it, addressed the issue on the merits. See Fed. R. Civ. P. 15(b) ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.") This belief on the part of the District Court was reasonable because the city did not raise any procedural objections to Excalibur's overbreadth argument. Accordingly, the overbreadth issue had been preserved for appeal.

Bates v. State Bar of Ariz., 433 U.S. 350 380 (1977). The doctrine developed out of a recognition that an overly broad statute may chill protected speech and the conclusion that "the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted". Id. Because the overbreadth doctrine has far-reaching ramifications, however, it is "strong medicine' that should be employed only 'with hesitation,' and then 'only as a last resort.'" Upper Midwest Booksellers Ass'n v. City of Minneapolis, 780 F. 2d 1389, 1391 (8th Cir. 1985) (quoting New York v. Ferber, 458 U.S. 747, 769 (1982)). To be facially invalidated under this doctrine, the overbreadth of an ordinance affecting both conduct and pure speech must be both "real" and "substantial" in relation to its "plainly legitimate sweep". Ferber, 458 U.S. at 769-70; Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). There is "a realistic danger that the ordinance itself will significantly compromise recognized First Amendment protections of parties not before the [c]ourt." Member of City Council v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984).

We will not strike down a ordinance for overbreadth if its legitimate reach "dwarfs its arguably impermissible applications." Ferber, 458 U.S. at 773.

Excalibur claims section 540.410 (g)(3) is unconstitutionally overbroad. Excalibur notes that some businesses classified as adults-only bookstores may have merchandise for sale that is not pornographic or sexually oriented. See Minneapolis, Minn., Code of Ordinances § 540.410(b) (defining an "adults-only bookstore" as "[a]n establishment having as a substantial or significant portion of its stock in [materials] which are distinguished or characterized by their principal emphasis on [sexually oriented matters], or an establishment with a segment or section devoted to the sale or display of such material..."). Excalibur further points out that subsection (g)(3) prohibits the display of any merchandise or pictures in a manner that would be visible from the sidewalk in front of the business. Thus, Excalibur maintains, subsection (g)(3) is overbroad in that it conceivably prohibits the display of merchandise such as a Walt Disney video or the Holy Bible.

Excalibur asks us to strike down this provision for the sake of third parties whose constitutionally protected speech may be chilled by subsection (g)(3).

Based upon a narrow construction of the ordinance, the District Court found that § 540.410 (g)(3) is not overbroad. "It has long been a fundamental tenet of First Amendment law that in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld." Virginia v. American Booksellers Ass'n, 484 U.S. 282, 297 (1988). Here, the District Court upheld subsection (g)(3) on the basis that the ordinance would prohibit the visibility only of sexually oriented materials. Excalibur contends the District Court's construction is untenable, however, because the Minnesota Court of Appeals has considered an overbreadth challenge to this provision and did not construe section 540.410 (g)(3) narrowly. See State v. Holmberg, 545 N.W. 2d 65, 70 (Minn. Ct. App. 1996).

We reject Excalibur's contention that the Minnesota Court of Appeals made no effort to construe the ordinance

narrowly. In Holmberg, the court addressed Excalibur's overbreadth argument in the context of a criminal appeal arising from the same facts as this action. The court described the speech at issue as commercial and adult (sexually oriented) speech. Noting the Supreme Court's statements that these categories of speech are entitled to only limited First Amendment protection, the Minnesota Court of Appeals held that subsection (g)(3) was not overbroad. Id. at 70. While the court did not explicitly state it was construing subsection (g)(3) narrowly, the reasoning in its opinion rests on the assumption that subsection (g)(3) applies to only commercial and sexually oriented speech. The court's opinion certainly did not anticipate the ordinance prohibiting displays of materials outside the scope of these two narrow categories of speech. Accordingly, we will likewise construe the provision as applying only to displays of commercial speech and sexually oriented speech.

To the extent that subsection (g)(3) prohibits the display of commercial speech, that is, speech that "does no

more than propose a commercial transaction, "Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976) (internal quotations omitted), the ordinance withstands Excalibur's overbreadth challenge. Commercial speech, as "the offspring of economic self-interest, is a hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation." Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 564 n.6 (1980). "[B]ecause the profit motive is thought to be sufficiently compelling to enable such speech to withstand the chilling effect of an overbread statute," we have noted that the overbreadth doctrine does not apply to commercial speech. Garner v. White, 726 F. 2d 1274, 1277 (8th Cir. 1984); see also Waters v. Churchill, 511 U.S. 661, 670 (1994) (noting that the Supreme Court has not extended the overbreadth doctrine to the commercial context); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 n.20 (1978) (stating that because it is not as likely to be deterred as noncommercial speech, commercial speech does not require the protection of

the overbreadth doctrine"); Van Bergen, 59 F. 3d at 1549-50 (rejecting an overbreadth argument because the affected third-party commercial entities were capable of bringing the constitutional claim themselves and because the statute would not likely chill their speech). Likewise, in this case, we decline to apply the "strong medicine" of the overbreadth doctrine to strike down subsection (g)(3) for the sake of third parties' commercial speech. Ferber, 458 U.S. at 769.

What remains then is subsection (g)(3)'s restriction on the display of sexually oriented materials. As we already explained above in addressing Excalibur's challenge to the sign and window restrictions in subsection (g)(4) of the ordinance, section 540.410 is a content-neutral regulation, enacted to further the City's significant interest in limiting the urban blight caused by adults-only businesses. The restriction in subsection (g)(3) prohibiting the visibility of sexually oriented speech through the windows of these establishments falls within the legitimate sweep of the ordinance. Thus, there is nothing overbread about subsection (g)(3)'s regulation of displays of

sexually oriented speech.

Because commercial speech does not warrant the protection of the overbreadth doctrine and sexually oriented speech is legitimately regulated by the ordinance, we will not strike down section 540.410 (g)(3) as unconstitutionally overbroad. Cf. Upper Midwest Booksellers Ass'n, 780 F. 2d at 1391-94 (rejecting overbreadth challenge to an ordinance creating restrictions on displays of any material that is "harmful to minors").

III.

For the above reasons, we affirm the judgment of the District Court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Excalibur Group, Inc.,
a Minnesota corporation,

Plaintiff,

MEMORANDUM OPINION AND ORDER

vs.

City of Minneapolis,

File No.: 3-94-324

Defendant.

The above-entitled matter came on for hearing before the Honorable Michael J. Davis on July 12, 1995 on Defendant's motion for summary judgment on all counts of Plaintiff's complaint.

Patrice Feterl, Esq., and Randall D.B. Tigue, Esq., appeared for and on behalf of Plaintiff.

James A. Moore, Esq., appeared for and on behalf of Defendant.

Plaintiff brought this declaratory judgment action seeking a declaration that Sections 540.410 and 34.60 of the Minneapolis Code of Ordinances are facially unconstitutional and unconstitutional as applied to Plaintiff in violation of the First and Fourteenth Amendments and that Section 34.60 does not require prior approval for the placement of signs.

Section 540.410 regulates adult-only businesses and Section 34.60 requires approval of the Heritage Preservation Commission for remodeling and repair of buildings within certain designated areas. Jurisdiction is alleged under 28 U.S.C. Sections 1343(3), 1367(a), 2201, and 2202.

1. Facts

Plaintiff is the operator of an adults-only bookstore, Sex World, located at 241 North 2d Avenue, Minneapolis, Minnesota. It is undisputed that Minneapolis Code of Ordinances, Section 540.410 applies to Plaintiff's business. Section 540.410 includes the following sign requirements:

> **Sign Requirements for all uses.** All new regulated uses, and all existing regulated uses by December 1, 1998, shall comply with the following sign requirements:

(1) All signs shall be flat wall signs.
(2) The amount of allowable sign area shall be one square foot of sign area per foot of lot frontage on a street.
(3) No merchandise or pictures of the products or entertainment on the premises shall be displayed in window area or any area where they can be viewed from the sidewalk in front of the building.
(4) Window area shall not be covered or made opaque in any way. No signs shall be placed in any window. A one square foot sign may be placed on the door to state hours of operation and admittance to adult only.

Section 34 of the Minneapolis Code of Ordinances established the Heritage Preservation Commission (HPC). Section 34.60 provides:

(a) The Commission shall review and approve or disapprove the issuance of city permits to do any of the following in a building or area or district designated for heritage preservation in the city:

(1) Remodel or repair in any manner that will charge the exterior appearance and/or interior wear designated.

Plaintiff has signs in the windows of the business which indicate the name of the store and the location of the entrance. There are also a number of large neon X's in the windows. Plaintiff also has plans to superimpose a multi-story "X" along the Washington Avenue frontage of the building. (Poor. Aff. PP 5-6, Def's Mem. Opp. Prelim. Inj.).

On March 10, 1994, the Minneapolis Inspections Office sent Plaintiff a compliance letter to inform Plaintiff window signs were not permitted pursuant to Section 540.410 (g)(4) and that signs installed on the building must be approved by the HPC as the business is located within the Historic Warehouse District. (Letter from Poor to Excalibur Group, Inc. on March 10, 1994, Exhibit A to Poor Aff.) Plaintiff was told to remove the window signs and neon "X"'s and to remove exterior signs until approval had been obtained by the HPC. Id.

Plaintiff's motion for a preliminary injunction restraining and enjoining Defendant, its agents, officers, employees, and person acting under its direction and control from citing Plaintiff for violating Sections 34.60(a)(1) and

540.410(g)(4) of the Minneapolis Code of Ordinances was denied on April 19, 1994. Defendant now moves for summary judgment on all counts of Plaintiff's Complaint.

II. Standard of Review

Summary judgment is appropriate if there is no genuine issue of the material fact and the moving party is entitled to judgment as a matter of law. Fe. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Unigroup, Inc. v. O'Rourke Storage & Transfer Co., 980 F. 2d 1217, 1219-20 (8th Cir. 1992). To determine whether genuine issues of material fact exist, a court conducts a two-part inquiry. The court determines materiality from the substantive law governing the claim. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Disputes over facts that might affect the outcome of the lawsuit according to applicable substantive law are material. Id. A material fact dispute is "genuine" if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party. Id. at 248-49.

III. Section 540.410

This court finds no dispute over the material facts of the instant case, and accordingly, will examine theses facts in light of controlling law. In Alexander v. City of Minneapolis, 928 F. 2d 278, 284 (8th Cir. 1991), the court upheld Section 540.410 under the test set forth in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). In Renton, the court addressed a zoning ordinance similar to Section 540.410 of the Minneapolis Code of Ordinances, that regulated the location of adult-only businesses. Because the ordinance did not ban such businesses altogether, the ordinance was analyzed as a form of time, place and manner regulation. Renton at 48, A time, place and manner regulation will be viewed as constitutional so long as it is content-neutral[6] and is designated to serve a substantial governmental interest and does not unreasonably limit alternative avenues of communication. Id. at 47.

Based on the Eighth Circuit's holding in Alexander,

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[6]The ordinance in Renton was held to be content-neutral because the city's predominant concern was with the secondary effects of adult-only businesses, not with the content of the businesses' products. Renton at 40-41.

Defendant argues Plaintiff's current claims are without merit because the ordinance has already been held constitutional and the sign requirement is but one part of the Defendant's attempt to regulate the secondary effects addressed in the ordinance. Plaintiff asserts that because Alexander focused only on the locational requirements contained in the ordinance, and did not specifically address the sign requirement portion of the ordinance, Alexander is not dispositive in this case. It is Plaintiff's position that the sign requirement must withstand constitutional analysis in and of itself.

In reviewing the legislative history of the Minneapolis Code of Ordinance and applicable case law, it is clear that the sign requirement cannot be analyzed in a vacuum. In Renton, the court held that the city was entitled to rely on the studies and experiences of other areas when enacting its ordinance on adult theater zoning ordinance. Id. at 51.

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or provide evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is

> reasonably believed to be relevant to the problem that the city addresses.

Id. Prior to the adoption of the ordinance, the City Planning Commission Staff prepared a memorandum detailing the results of a number of studies from different states as to the effects of adult-only businesses on surrounding areas. (Memoranda from Planning Commission Staff to Planning Commission of September 10, 1986, Pltf. mem. Supp. Prelim. Inj. Exhibit A, p. 3 (hereinafter Planning Memoranda)). An Indianapolis study, which typified the results of the other studies, found that various negative effects upon nearby properties associated with adult-only businesses included an increase in crime and sex related criminal activity, a decrease in property values and a greater turnover in property ownership than elsewhere. Id. at 2. The report characterized the impact of such businesses upon property values as being "substantial to moderate". Id.

The planning staff recommended locational standards in the ordinance, because while there was an adverse impact of

adult uses upon commercial properties, it was greater in residential areas. The planning staff also recognized that although the locational standards would protect the residential districts from the secondary effects, such effects would not vanish because the adult-only businesses moved to the commercial areas.

> The Downtown is best able to "buffer" the impact of adult uses on surrounding properties. This would be even more effective if design controls were included to control the appearance and image of adult businesses.

Id. Consequently, Section 540.410 is content-neutral, because the city's predominant concern in enacting the design controls was to protect the commercial areas from the same secondary effects of adult-only businesses which threatened the residential districts, rather than censuring the content of those businesses' products.

Plaintiff argues that there is no empirical evidence that establishes a substantial government interest is served by regulating the image of adult-only businesses through the regulation of signs. As noted above, however, there is evidence

from the Indianapolis study that such businesses negatively effect property values and that development standards may control such effects. In this case, Defendant has chosen to address this problem by regulating the image of the adult-only businesses. It is not the function of the courts to appraise the wisdom of the city's choice of solutions for serious problems. Young v. American Mini-Theatres, Inc., 427 U.S. 50, 71 (1976). "Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." Id.; South Suburban Housing Center, 925 F. 2d at 897.

Finally, the sign requirement offer reasonable alternative avenues of communication. Although the ordinance prohibits window signs, wall signs are allowed. The size of wall signs are regulated, the contents of the signs are not. Therefore, Plaintiffs have the opportunity to advertise how they choose, within a specified space.

Plaintiff also challenges the ordinance on the basis that it is constitutionally overbroad-that on its face, the prohibitions contained in the ordinance are susceptible to application to

constitutionally protected speech. Plaintiff argues that it cold violate subparagraph (3) - which provides that no merchandise or pictures shall be displayed in windows or ca be viewed from the sidewalk by stocking the Bible by the window. This argument is similarly without merit. An adults-only bookstore, to which the ordinance applies, is defined by the merchandise it sells, which is defined as having "principal emphasis on matters depicting, describing or relating to nudity, sexual conduct, etc." This is the type of merchandise to which subparagraph (3) applies. Like the ordinance in Young v. American Mini-Theatres, Inc., 427 U.S. 50, 60 (1976), this court sees no reason why the ordinance at issue herein will not be subject to a narrowing construction by state courts.

Accordingly, Section 540.410(g)(4) of the Minneapolis Code of Ordinances is found to be a valid time, place and manner regulation under the test set forth by the United States Supreme Court in Renton.

IV. Section 36.40(a)(1)

Plaintiff asserts that Section 36.40(a)(1) is not

applicable to window signs, and this court agrees. This section provides that the Heritage Preservation Commission shall review and approve or disapprove the issuance of city permits to remodel or repair in any manner that will change the exterior appearance and/or interior in a building or area designated for heritage preservation. Plaintiff's business is within the Historical Warehouse District, therefore Section 366.40(a)(1) applies to any remodeling or repair that requires a permit. It is clear that the ordinance is not applicable to the placement of signs nor the contents of signs.

The reference to Section 36.40(a)(1) in the compliance letter is directed toward the plans for a multi-story "X", not to Plaintiff's signs or their contents. (See Poor Aff. PP. 5-6).

This section may be implicated if Plaintiff proceeds with its plans, but Plaintiff has taken no action in pursuit of this plan and the city has no threatened or pending action against Plaintiff under Section 36.40(a)(1).

As the ordinance does not implicate First Amendment rights, and Defendant is not attempting to regulate window sign

pursuant to Section 36.40(a)(1), there is no merit to Plaintiff's constitutional claim against such section.

ORDER

Based upon the above, the files, records and proceedings herein, it is hereby ORDERED that Defendant City of Minneapolis' motion for summary judgment is GRANTED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated:

Michael J. Davis
Judge of District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Excalibur Group, Inc.,
a Minnesota corporation,

Plaintiff,

v.

City of Minneapolis,

Defendant.

MEMORANDUM OPINION AND ORDER

File No.: 3-94-324

The above entitled matter came of for hearing before the Honorable Michael J. Davis on April 13, 1994 on Plaintiff's motion for a preliminary injunction and temporary restraining order.

Randall D.B. Tigue, Esq., appeared for and on behalf of Plaintiff.

James A. Moore, Esq., appeared for and on behalf of Defendant.

Plaintiff brings this action under 42 U.S.C. Section 1983 to prevent enforcement against it of Section 540.410 and 34.60 of the Minneapolis Code of Ordinances. Section 540.410 regulates adult-only businesses and Section 34.60 requires approval of the Heritage Preservation Commission for remodeling and repair of buildings within certain designated areas. Plaintiff seeks a declaratory judgment declaring the above-referenced ordinances are facially unconstitutional and unconstitutional as applied to Plaintiff in violation of the First and Fourteenth Amendments and that Section 34.60 does not require prior approval for the placement of signs. Jurisdiction is alleged under 28 U.S.C. Sections 1343 (3), 1367(a), 2201, and 2202. The matter is before the court on Plaintiff's motion for a preliminary injunction.

I.

Plaintiff is the operator of an adults-only bookstore, Sex World, located at 241 North 2d Avenue, Minneapolis, Minnesota. It is undisputed that Minneapolis Code of Ordinances, Section 540.410 applies to Plaintiff's business.

Section 540.410 includes the following sing requirements:

> **Sign Requirement for all uses.** All new regulated uses, and all existing regulated uses by December 1, 1988, shall comply with the following sign requirements:
>
> > (1) All signs shall be flat wall signs.
> > (2) The amount of allowable sign area shall be one square foot of sign area per foot of lot frontage on a street.
> > (3) No merchandise or pictures of the products or entertainment on the premises shall be displayed in window area or any area where they can be viewed from the sidewalk in front of the building.
> > (4) Window area shall not be covered or made opaque in any way. No signs shall be placed in any window. A one square foot sign may be placed on the door to state hours of operation and admittance to adult only.

Section 34 of the Minneapolis Code of Ordinances established the Heritage Preservation Commission (HPC). Section 34.60 provides:

> (a) The Commission shall review and approve or disapprove the issuance of city permits to do any of the following in a building or area or district designated for heritage preservation in

the city:

> (1) Remodel or repair in any manner that will charge the exterior appearance and/or interior wear designated.

Plaintiff has signs in the windows of the business which indicate the ame of the store and the location of the entrance. There are also a number of large neon X's in the windows. Plaintiff also has plans to superimpose a multi-story "X" along the Washington Avenue frontage of the building. (Poor. Aff. PP 5-6, Def's Mem. Opp. Prelim. Inj.).

On March 10, 1994, the Minneapolis Inspections Office sent Plaintiff a compliance letter to inform Plaintiff window signs were not permitted pursuant to Section 540.410 (g)(4) and that signs installed ont eh building must be approved by the HPC as the business is located within the Historic Warehouse District. (Letter from Poor to Excalibur Group, Inc. on March 10, 1994, Exhibit A to Poor Aff.) Plaintiff was told to remove the window signs and neon "X"'s and to remove exterior signs until approval had been obtained by the HPC. Id.

Plaintiff now moves for a preliminary injunction

restraining and enjoining Defendant, its agents, officers, employees, and person acting under its direction and control from citing Plaintiff for violating Sections 34.60(a)(1) and 540.410(g)(4) of the Minneapolis Code of Ordinances

II.

In order to obtain a preliminary injunction, the moving party must demonstrate: (1) that it is threatened with irreparable harm; (2) that such harm outweighs any injury which granting the injunction will inflict on other parties; (3) that the movant will probably succeed on the merits; and (4) that the public interest favors an injunction. General Mills, Inc. v.Kellogg Co., 824 F. 2d 622, 624 (8th Cir. 1987); Dataphase Systems, Inc. v. C.L. Systems, Inc., 640 F. 2d 109, 114 (1981). The courts have been directed not to woodenly weigh the probability of success. General Mills 824 F. 2d at 624. "Rather, the essential inquiry in determining the propriety of a preliminary injunction is whether the balance of other factors tips decidedly toward the movant and the movant has also raised questions so serious and difficult as to call for more

deliberate investigation." Id. The district court has broad discretion when ruling on requests for preliminary relief. Id.

III. Section 540.410

A. Irreparable Harm

The threshold inquiry is whether the Plaintiff has shown a threat of irreparable injury. Plaintiff argues that this element is established because Plaintiff is in the position of having to choose between foregoing the exercise of First Amendment rights and criminal prosecution for exercise such rights. Plaintiff relies on ILQ Investments, Inc. v. City of Rochester, 816 F. Supp. 516 (D. Minn. 1993), which held that the threat of the loss of First Amendment freedoms combined with criminal prosecution for choosing to exercise such rights establishes irreparable injury warranting injunctive relief. Defendant argues that Plaintiff cannot show irreparable harm as this case does not implicate Plaintiff's First Amendment rights.

The sign regulations at issue herein do implicate Plaintiff's First Amendment rights because it dictates how, and where Plaintiff may exercise its First Amendment rights in the

form of signs. See e.g. South Suburban Housing Center v. Board of Realtors, 935 F. 2d 868 (7th Cir. 1991) (municipalities' regulations as to size and number of "for sale" signs held not violative of First Amendment). Therefore, irreparable injury can be presumed if Plaintiff is successful in proving a likelihood of First Amendment violation.

B. Success on the merits

In Alexander v. City of Minneapolis, 928 F. 2d 278, 284 (8th Cir. 1991), the court upheld Section 540.410 under the test set forth in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). In Renton, the court addressed a zoning ordinance similar to Section 540.410 of the Minneapolis Code of Ordinances, that regulated the location of adult-only businesses. Because the ordinance was analyzed as a form of time, place and manner regulation. Renton, at 48. A time, place and manner regulation will be viewed as constitutional so long as it

is content-neutral[7] and is designed to serve a substantial governmental interest and does not unreasonably limit alternative avenue of communication. Id., at 47.

Based on the Eighth Circuit's holding in Alexander, Defendant argues Plaintiff's current claims are without merit because the ordinance has already been held constitutional and the sign requirement is but one part of the Defendant's attempt to regulate the secondary effects addressed in the ordinance. Plaintiff asserts that because Alexander focused only on the locational requirements contained in the ordinance, and did not specifically address the sign requirement portion of the ordinance, Alexander is not dispositive in this case. It is Plaintiff's position that the sign requirement must withstand constitutional analysis in and of itself.

In reviewing the legislative history of the Minneapolis Code of Ordinance and applicable case law, it is clear that the

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[7]The ordinance in Renton was held to be content-neutral because the city's predominant concern was with the secondary effects of adult-only businesses, not with the content of the businesses' products. Renton at 40-41.

sign requirement cannot be analyzed in a vacuum. In Renton, the court held that the city was entitled to rely on the studies and experiences of other areas when enacting its ordinance on adult theater zoning ordinance. Id. at 51.

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or provide evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

Id. Prior to the adoption of the ordinance, the City Planning Commission Staff prepared a memorandum detailing the results of a number of studies from different states as to the effects of adult-only businesses on surrounding areas. (Memoranda from Planning Commission Staff to Planning Commission of September 10, 1986, Pltf. mem. Supp. Prelim. Inj. Exhibit A, p. 3 (hereinafter Planning Memoranda)). The staff pointed to an Indianapolis study which in part, indicated:

> Housing values in the study area appreciated at only one-half of the rate of control areas.
>
> The survey showed that 50 percent of the appraisers felt that there would be substantial to

> moderate negative impact on property values. However, 30 percent saw little or no impact and 20 percent saw the effect as being dependent on other factors in the area such as development standards imposed on the use and the ability of the commercial area to buffer the impact from other uses.

Planning Memoranda, p. 3. The staff noted that this finding was "important to provide the rationale for allowing these uses Downtown. The Downtown is best able to "buffer the impact of adult uses on surrounding properties. This would be even more effective if design controls were included to control the appearance and image of adult businesses." Id. Thus, the city had evidence that adult-only businesses affect property values and that development standards effect the impact of such businesses on surrounding property. Furthermore, not only do the design controls attempt to control the negative effects on property values, it appears the image controls are aimed at the other impacts of such businesses as well.

Plaintiff argues that there is no empirical evidence that established a substantial government interest is served by

regulating the image of adult-only businesses through the regulation of signs. As noted above, however, there is evidence from the Indianapolis study that such businesses negatively effect property values and that development standards may control such effects. In this case, Defendant has chosen to address this problem by regulating the image of the adult-only businesses. It is not the function of the courts to appraise the wisdom of the city's choice of solutions for serious problems. Young v. American Mini-Theatres, Inc., 427 U.S. 50, 71 (1976). "Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." Id.; South Suburban Housing Center, 935 F. 2d at 897.

Finally, the sign requirements offer reasonable alternative avenues of communication. Although the ordinance prohibits window signs, wall signs are allowed. The size of wall signs are regulated, the contents of the signs are not. Therefore Plaintiffs have the opportunity to advertise how they choose, within a specified space.

Accordingly, Plaintiff is unlikely to succeed on the

merits of its constitutional claim against Section 540.410 (g)(4) of the Minneapolis Code of Ordinances. Therefore this factor weighs against granting injunctive relief.

C. Balance of Harms

Given the current record of this case, this factor also weighs in favor of denying injunctive relief. A preliminary injunction will impair Defendant's ability to exercise its police powers in the form of zoning ordinances. ILQ Investments, 816 F. Supp. at 522; Bukaka, Inc. v. County of Benton No.: 5-93-142 (D. Minn. 1993). ON the other hand, the threat to Plaintiff's First Amendment rights is nominal.

D. Public Interest

Plaintiff cites First Amendment rights while Defendant seeks to enforce zoning ordinances aimed at protecting the welfare, safety and health of the public through controlling the negative impact of adult-only bookstores. Given the fact that Plaintiff is unlikely to succeed on the merits of its claim, this factor also weighs in favor of denying injunctive relief.

IV. Section 36.40 (a)(1)

Plaintiff asserts this section is not applicable to window signs, and this court agrees. Section 34.60 (a)(1) provides the Heritage Preservation Commission shall review and approve or disapprove the issuance of city permits to remodel or repair in any manner that will change the exterior appearance and/or interior in a building or area designated for heritage preservation. Plaintiff's business is within the Historical Warehouse District, therefore Section 34.60 (a)(1) applies to any remodeling or repair that requires a permit. It is clear that the ordinance is not applicable to the placement of signs nor the contents of signs.

The reference to Section 34.60 (a)(1) in the compliance letter is directed toward the plans for a multi-story "X", not to Plaintiff's signs or their contents. (See Poor aff. pp. 5-6).

As the ordinance does not implicate First Amendment rights and Defendant is not attempting to regulate window signs pursuant to Section 34.60 (a)(1), there is no merit to Plaintiff's constitutional claims against such section.

ORDER

Accordingly, based upon the above, and all files, records, and proceedings herein, **IT IS HEREBY ORDERED** that the motion of Plaintiff for a preliminary injunction is denied.

Dated:

Michael J. Davis
Judge of District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD JUDICIAL DISTRICT

Excalibur Group, Inc.,
a Minnesota corporation,

Plaintiff,

v.

City of Minneapolis,

Defendant.

DEFENDANT'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT
File No.: 3-94 Civ. 324

TO: Plaintiff above named and its attorney, Randall D.B. Tigue, Esq., 2620 Nicollet Avenue South, Minneapolis, MN 55408

PLEASE TAKE NOTICE that Defendant by and through its undersigned attorney will move the Court, the Honorable Michael Davis presiding, on July 12, 1995, at 9:00 a.m. or as soon thereafter as counsel may be heard, at Courtroom No. 3, 7th Floor, United States District Courthouse, 316 North Robert Street, St. Paul, MN for an Order pursuant to Rule 56, Fed. R. Civ. P., granting summary judgment to

Defendant in all respects

MOTION

Defendant hereby move the Court pursuant to Fed. R. Civ. P. 56 for summary judgment on all counts of Plaintiff's Complaint. Said Motion is based upon the enclosed Memorandum in Support of Motion and Affidavit and upon the files, records and proceedings herein.

Dated:

SURELL BRADY
Assistant Attorney
By

JAMES A. MOORE
ASSISTANT CITY ATTORNEY
Atty. ID. No. 16883X
Attorneys for Defendant
City of Minneapolis
300 Metropolitan Centre
333 South Seventh Street
Minneapolis, MN 55402
612/673-2063

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-1098MNST

Excalibur Group, Inc.,	*	
	*	
Appellant,	*	Order Denying Petition
	*	for Rehearing and
vs.	*	Suggestion for
	*	Rehearing En Banc
City of Minneapolis,	*	
	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. Judge McMillian and Judge Morris Sheppard Arnold would grant the suggestion. The petition for rehearing by the panel is also denied.

August 20, 1997

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals; Eighth Circuit

AMENDMENT I.

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

§ 1. Citizenship rights not to be abridged by states

Section 1. All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process or law; nor deny to any person within its jurisdiction and equal protection of the laws.

Sec. 540.410.

"(a) PURPOSE. In the development and execution of this ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the use and enjoyment of adjacent areas. Special regulation of these uses is necessary to ensure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. These special regulations are itemized in this section. The primary control or regulation is for the purpose of preventing a concentration of these uses in any one area.

Uses subject to these controls are as follows:

Adults-only bookstores;

Adults-only motion picture theaters;

Adult entertainment centers;

Massage parlors;

Rap parlors;

Saunas.

(b) DEFINITIONS. Whenever used in this section, the following words or phrases shall have the meanings ascribed to them:

ADULTS-ONLY BOOKSTORE. An establishment having a substantial or significant portion of its stock in trade, books, magazines, films for sale or viewing on the premises by use of motion picture devices or other coin-operated means, and other periodicals which are distinguished or characterized by their principal emphasis on matters depicting, describing or relating to nudity, sexual conduct, sexual excitement or sadomasochistic abuse, as defined below, or an establishment with a segment or section devoted to the sale or display or such material, for sale to patrons therein.

(c) LOCATION RESTRICTIONS.

(1) Adults-only bookstores, adults-only motion picture theaters, and adult entertainment centers. No adult-only bookstores, adults-only motion picture theaters or adult entertainment center shall be operated or maintained except in the B4-central business district. However, none of the above uses shall be permitted on any property with its main public entrance on Nicollet.

(2) All regulated uses. No adults-only bookstore, adults-only motion picture theater, adult entertainment center, massage parlor or rap parlor or sauna shall be operated or maintained within one thousand 1,000 feet of a residentially zoned district, and within five hundred (500) feet of a church, state licensed day care facility, established prior to November 1, 1986, public library, and public educational facility which serve persons age seventeen (17) or younger, an elementary or high school. Only

one of the above regulated uses shall be allowed per block face. Provided further, that no adult entertainment center shall be permitted to locate except within the B4-central business district after December 20, 1985.

(d) MEASUREMENT. The distance limitations in subsection (c) shall be measured in a straight line from the main entrances of said premises, or from the lot lines of properties in residentially zoned districts.

(e) SIGN REQUIREMENTS FOR ALL USES. All new regulated uses, and all existing regulated uses by December 1, 1988, shall comply with the following sign requirements;

(1) All signs shall be flat wall signs.

(2) The amount of allowable sign area shall be one square foot of sign area per foot of lot frontage on the street.

(3) No merchandise or pictures of the product or entertainment on the premises shall be displayed in the window area or any area where they can be viewed from the sidewalk in front of the building.

(4) Window areas shall not be covered or made opaque in any way. No signs shall be placed in any window. One square foot sign may be placed on the door to state hours of operation and admittance to adults only."

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Excalibur Group, Inc.,
a Minnesota corporation,

Plaintiff,

vs. **COMPLAINT**

File No.
City of Minneapolis,

Defendant.

JURISDICTION

1. The jurisdiction of this Court is invoked under the laws of the United States and, in particular, Title 28 U.S.C. Sections 1343(3), 2201 and 2202; Title 42 U.S.C. Section 1983, and the Constitution of the United States, in particular, under the First and Fourteenth Amendments thereto, this being an action authorized by law to redress the deprivation, under color of state law,

statute, ordinance, custom and usage of rights, privileges, and immunities guaranteed to Plaintiff under the Constitution of the United States. Jurisdiction is also invoked under the doctrine of supplemental jurisdiction, as set forth in Title 28 U.S.C. Section 1367(a).

PARTIES

2. Plaintiff Excalibur Group, Inc., is a corporation organized under the laws of the State of Minnesota. It currently does business as Sex World, located at 241 North Second Avenue, Minneapolis, Minnesota.

3. Defendant City of Minneapolis is a municipal corporation, organized under the Laws of the State of Minnesota.

FACTUAL BACKGROUND

4. On November 7, 1986, the City Council of

Defendant City of Minneapolis enacted an amendment to its zoning code, in particular, amending Minneapolis Code of Ordinances Section 540.410, regulating the location of adults-only businesses within the City of Minneapolis. The ordinance, as amended, provides as follows:

> "(a) PURPOSE. In the development and execution of this ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the use and enjoyment of adjacent areas. Special regulation of these uses is necessary to ensure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. These special regulations are itemized in this section. The primary control or regulation is for the purpose of preventing a concentration of these uses in any one area.
>
> Uses subject to these controls are as follows:
>
> Adults-only bookstores;

Adults-only motion picture theaters;

Adult entertainment centers;

Massage parlors;

Rap parlors;

Saunas.

(b) DEFINITIONS. Whenever used in this section, the following words or phrases shall have the meanings ascribed to them:

ADULTS-ONLY BOOKSTORE. An establishment having a substantial or significant portion of its stock in trade, books, magazines, films for sale or viewing on the premises by use of motion picture devices or other coin-operated means, and other periodicals which are distinguished or characterized by their principal emphasis on matters depicting, describing or relating to nudity, sexual conduct, sexual excitement or sadomasochistic abuse, as defined below, or an establishment with a segment or section devoted to the sale or display or such material, for sale to patrons therein.

(c) LOCATION RESTRICTIONS.

(1) Adults-only bookstores, adults-only motion picture theaters, and adult entertainment centers. No adult-only

bookstores, adults-only motion picture theaters or adult entertainment center shall be operated or maintained except in the B4-central business district. However, none of the above uses shall be permitted on any property with its main public entrance on Nicollet.

(2) All regulated uses. No adults-only bookstore, adults-only motion picture theater, adult entertainment center, massage parlor or rap parlor or sauna shall be operated or maintained within one thousand 1,000 feet of a residentially zoned district, and within five hundred (500) feet of a church, state licensed day care facility, established prior to November 1, 1986, public library, and public educational facility which serve persons age seventeen (17) or younger, an elementary or high school. Only one of the above regulated uses shall be allowed per block face. Provided further, that no adult entertainment center shall be permitted to locate except within the B4-central business district after December 20, 1985.

(d) MEASUREMENT. The distance limitations in subsection (c) shall be measured in a straight line from the main entrances of said premises, or from the lot lines of properties in residentially zoned districts.

(e) SIGN REQUIREMENTS FOR ALL

USES. All new regulated uses, and all existing regulated uses by December 1, 1988, shall comply with the following sign requirements;

(1) All signs shall be flat wall signs.

(2) The amount of allowable sign area shall be one square foot of sign area per foot of lot frontage on the street.

(3) No merchandise or pictures of the product or entertainment on the premises shall be displayed in the window area or any area where they can be viewed from the sidewalk in front of the building.

(4) Window areas shall not be covered or made opaque in any way. No signs shall be placed in any window. One square foot sign may be placed on the door to state hours of operation and admittance to adults only."

6. In enacting and enforcing the foregoing ordinance, Defendant acted under color of state law, statute, ordinance, custom and usage, within the meaning of Title 42 U.S.C. Section 1983.

7. Chapter 34 of the Minneapolis Code of

Ordinances establishes a government agency known as the Heritage Preservation Commission. Among its duties are those set forth in Minneapolis Code of Ordinances Section 34.60, which provides, in pertinent part, as follows:

> "(a) The Commission shall review and approve or disapprove the issuance of city permits to do any of the following in a building or area or district designated for heritage preservation in the city:
>
> (l) Remodel or repair in any manner that will change the exterior appearance and/or interior wear designated:
>
> (2) Move a building.
>
> (3) Destroy a building in whole or in part.
>
> (4) Change the nature or appearance of preserved area.
>
> (b) Prior to approval or disapproval of a permit, the Commission shall hold a public hearing, notice of which shall have been published in a newspaper of general circulation, and notice sent to all property owners within two hundred (200) feet of the affected property. Every application for a building permit in relation to property

designated for heritage preservation in the city shall be accompanied by plans for the proposed work to be done. Such plan shall be referred by the Director of Inspections to the Heritage Preservation Commission, and the Director of Inspections shall not issue permits in regard to that application until receiving a report from the Heritage Preservation Commission. In the event that the Director of Inspections certifies to the commission that the destruction of a building or structure subject to this chapter is necessary to protect the public safety, an expedited public hearing may be held without providing notice which is otherwise required by this subdivision.

(c) The commission shall review such plans and shall render its decision thereon as a written order to the Director of Inspections.

(d) If the Commission shall not have disapproved the plans, the Director of Inspections shall not issue such permit.

(e) The Commission shall furnish the applicant with a copy of the Commission's written order and decision, together with a copy of any recommendations for changes necessary to be made before the commission will reconsider the applicant's plan.

(f) If no action upon the plan submitted to the Commission has been taken at the expiration of forty-five (45) days from the date of application for a building permit, and submission of plans, such plans shall be deemed to have been approved, and if all other requirements of the city have been met, the Director of Inspections shall authorize a permit for the proposed building.

(g) Any person having an interest in property affected by an order of the Commission shall, within twenty (20) days after the date of the receipt of the Commission's Order and Decision, have a right to appeal such order to the City Council for review."

8. In order to have a plan approved by the Heritage Preservation Commission, Section 34.70 of the Minneapolis Code of Ordinances requires the following:

"Before approving plans for any proposed building located or to be located in a district, the Commission shall make findings in regard to the following:

(a) In the case of a proposed alteration or addition to an existing building, that such alteration or building will not materially impair the architectural or historic value of

the building, and shall make written findings considering the existing structures and existing exterior appearance, building height, building width, depth or other dimensions, roof style, type of building materials, ornamentation, paving set back and color."

CAUSE OF ACTION -- COUNT I

9. Plaintiff re-alleges the allegations set forth in Paragraphs 1-8, supra.

10. Plaintiff's business, entitled "Sex World," located at 241 North Second Avenue, is an "adult bookstore" within the meaning of Minneapolis Code of Ordinances Section 540.410(b), in that it sells sexually explicit books, magazines, and films for sale, and features for viewing on the premises adults-only motion picture films by means of motion picture devices. As such, its activities are entitled to constitutional protection under the First and Fourteenth Amendments to the United States Constitution.

11. Plaintiff's operation of its adult bookstore at 241 North Second Avenue fully complies with all of the locational requirements of Minneapolis Code of Ordinances Section 540.410(c).

12. Placed in the windows of the Sex World Bookstore are signs indicating the name of the store, and the location of the front entrance thereto. Also in the windows are neon signs indicating nothing other than the letter "X."

13. On or about March 10, 1994, Stephen Poor, Zoning Inspector for the City of Minneapolis, issued to Plaintiff a Notice of Ordinance Violation, a copy of which is attached hereto as Exhibit A, asserting that Plaintiff's window signs violate Minneapolis Code of Ordinances Section 540.410(g)(4).

14. Failure to comply with said ordinances could result in criminal prosecution, subjecting Plaintiff to

punishment in the amount of a fine of $700.00 fine, imprisonment of up to 90 days or both, for each day of violation of the ordinance.

15. Minneapolis Code of Ordinances Section 540.410(g)(4) is facially unconstitutional, and unconstitutional as applied to Plaintiff, on the following grounds:

a. The ordinance was enacted in the absence of any empirical finding that the provisions were necessary to combat any adverse secondary effects of adults-only bookstores, and as such, the provisions are unlawful under the First and Fourteenth Amendments to the United States Constitution.

b. The ordinance is not related to the accomplishment of any compelling state interest, and, as a result, deprives Plaintiff of equal protection of the laws, as guaranteed by the First and Fourteenth Amendments

to the United States Constitution.

CAUSE OF ACTION -- COUNT II

16. Plaintiff re-alleges the allegations in Paragraphs 1-15, supra.

17. In the same letter to Plaintiff, Zoning Inspector Poor asserted that Plaintiff's signs also violated Minneapolis Code of Ordinances Section 34.60(a)(1), in that Plaintiff is required to obtain the approval of the Historic Preservation Commission, prior to any signs being installed on the premises.

18. Said order was unlawful, in that nothing on the face of Minneapolis Code of Ordinances Section 34.60(a)(1) requires the approval of the Heritage Preservation Commission for the placement of signs on a building; rather, Heritage Preservation Commission approval is required only for remodeling and repair of a building.

19. In the event that Heritage Preservation Commission were required prior to the placement of a sign, it would render Section 34.60(a)(l) facially unconstitutional, and unconstitutional as applied, as a violation of the First and Fourteenth Amendments to the United States Constitution, in that it would subject rights guaranteed by the First and Fourteenth Amendments to the United States Constitution to the unfettered discretion of a governmental agency.

EQUITY AND IRREPARABLE INJURY

20. Plaintiff re-alleges the allegations set forth in 1-19, supra.

21. Unless enforcement of Minneapolis Code of Ordinances Section 540.410(g)(4) and 34.60(a)(l) are temporarily and permanently enjoined, Plaintiff will suffer irreparable injury, since it will be forced to chose between continuing conduct entitled to protection under the First

and Fourteenth Amendments to the United States Constitution on the one hand, and criminal prosecution on the other.

WHEREFORE, Plaintiff requests the judgment and decree of this Court as follows:

a. That this Court enter a declaratory judgment declaring Minneapolis Code of Ordinances Section 540.410(g)(4) to be facially unconstitutional and unconstitutional as applied to Plaintiff, as a violation of the First and Fourteenth Amendments to the United States Constitution.

b. That this Court enter a declaratory judgment declaring that Minneapolis Code of Ordinances Section 34.60(a)(1) does not require Heritage Preservation Commission approval prior to the placement of signs on a building, in that the ordinance, on its face, mandates such approval only in the event of remodeling or repairing

a building .

c. In the alternative, that this Court enter a declaratory judgment declaring Section 34.60(a)(l) facially unconstitutional and unconstitutional as applied, as a violation of the First and Fourteenth Amendments to the United States Constitution.

d. That this Court enter a preliminary and permanent injunction, and until a hearing can be held on a preliminary injunction, a temporary restraining order, restraining and enjoining Defendant, its agents, officers, employees, and persons acting under its direction and control, from taking any action to enforce the provisions of Minneapolis Code of Ordinances Sections 540.410(g)(4) and 34.60(a)(l) against Plaintiff.

e. That Plaintiff be awarded its reasonable costs, disbursements, and attorney's fees, pursuant to Title 42 U.S.C. Section 1988.

f. That the Court grant such other and further relief as it may deem just, fair, and equitable.

Randall D.B. Tigue
Attorney for Plaintiff
2620 Nicollet Avenue
Minneapolis, Minnesota 55408
(612) 874-9903
Att. Id. No. 110000

Dated: April 4, 1994.

VERIFICATION

STATE OF MINNESOTA)
)ss
COUNTY OF HENNEPIN)

Dennis Buchanan, being first duly sworn on oath, hereby deposes and says that he is the President of Plaintiff corporation in the above-entitled matter, that he has read the foregoing complaint, knows the contents thereof, and that the same is true and correct, except as

to those matters stated on information and belief, and as to those matters, he believes them to be true.

_____
Dennis Buchanan

Sworn to and subscribed to before
me this ____ day of _____, 1994.

_____
Notary Public

March 10, 1994

Exhibit A

Excalibur Group, Inc.
241 North 2d Avenue
Minneapolis, MN 55401

Dear Sir:

This letter serves as a notice of violation of Ch. 34.60 (a)(1) and 540.410 (g)(4).

As you are aware, this building is in the Historic Warehouse District and, therefore, requires the Historic Preservation Commission's approval prior to any internal signs being installed on the building.

Further, window signs are not permitted under 540.410 (g)(4). Please remove all window signs and Neon "X" from all windows, and remove all exterior signs (until HPC approval has been obtained) on or before March 24, 1994.

I will reinspect on March 25, 1994. Failure to comply with these orders may result in further action.

If you have any questions, call me at 612/673-5837 between 8:00 a.m. - 10:00 a.m.

Sincerely,

Stephen Poor
Zoning Inspector

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Excalibur Group, Inc.,
a Minnesota corporation,

Plaintiff,

vs.

City of Minneapolis,

Defendant.

MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

File No.

The above-named Plaintiff, by the undersigned, hereby moves this Court for an order, pursuant to Rule 65(a) and (b) of the Federal Rules of Civil Procedure, granting to Plaintiff a preliminary injunction until the above-entitled action is finally resolved on the merits, and until a hearing on a motion for preliminary injunction can be had, a temporary restraining order, as follows:

1. Restraining and enjoining Defendant, its

agents, officers, employees, and persons acting its direction and control from arresting, citing, or threatening to arrest or cite, Plaintiff, or any persons acting under Plaintiff's direction and control, for violating Minneapolis Code of Ordinances Section 540.410(g)(4) or 34.60(a)(1), for its operation of adults-only bookstore at 241 N. 2nd Avenue, Minneapolis.

2. Restraining and enjoining Defendant, its officers, agents, employees, and persons acting under its direction and control, from taking any other action to enforce the provisions of Minneapolis Code of Ordinances Section 540.410(g)(4) or 34.60(a)(1) against Plaintiff, or persons acting under Plaintiff's direction and control.

3. Waiving any security requirements of Rule 65(c) of the Federal Rules of Civil Procedure.

The foregoing motion shall be based upon the attached affidavits and exhibits, upon the attached

memorandum of law, and upon all of the files, records, and proceedings herein.

Randall D. B. Tigue
Attorney for Plaintiff
2620 Nicollet Avenue
Minneapolis, Minnesota 55408
(612) 874-9903

Dated: April 5, 1994.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Excalibur Group, Inc.,
a Minnesota corporation,

Plaintiff,
vs.

AFFIDAVIT OF RANDALL D.B. TIGUE

City of Minneapolis,

File No.

Defendant.

STATE OF MINNESOTA)
)ss
COUNTY OF HENNEPIN)

Randall D.B. Tigue, being first duly sworn on oath, hereby deposes and says the following:

1. Your affiant is the attorney for Plaintiff in the above-entitled matter.

2. Your affiant was also attorney for Plaintiff in Alexander v. City of Minneapolis, United States District

Court File No. 3-88 Civ. 808, a decision publicly reported as Alexander v. City of Minneapolis, 713 F. Supp. 1296 (D. Minn. 1989), vacated in part and reversed in part, 928 F. 2d 278 (8th Cir. 1991).

3. In that case, this Court, by the Honorable Donald Alsop, declared facially unconstitutional and permanently enjoined the operation of all of Minneapolis Code of Ordinances Section 540.410, but applied the relief only to the named Plaintiffs in that case, to-wit: Ferris Alexander, and U.S. Video, Inc., a Minnesota Corporation.

4. During the course of that trial, your affiant did extensive discovery as to the legislative history of Section 540.410.

5. As part of that discovery, your affiant tendered to the City of Minneapolis a Request for Production of Documents, inter alia seeking discovery of the legislative

history of Section 540.410, to discover the purposes for which it was enacted, and the empirical basis for any conclusions which led to the enactment of its provisions. The city's response to said request for production of documents is attached hereto as Exhibit A and incorporated by reference as if fully set forth herein.

6. While much of the documents furnished reflected the purported justification for the entirety of the ordinance, in particular the locational restrictions of adults-only bookstores, some of the justification contained therein related to the sign restrictions which are the subject of the above-entitled action. The only documents reflecting a legislative history as to the purpose and factual basis of the sign restrictions are the following:

a. A report of the City Planning Commission, dated September 25, 1986, a copy of which is attached hereto as Exhibit B, adopts the report from its staff, dated

September 10, 1986, a copy of which is attached hereto as Exhibit C. That report justifies the sign restrictions as "design controls" and states that said controls "were included to control the appearance and image of adult businesses."

b. The minutes of the standing committee on zoning and planning, a copy of which is attached hereto as Exhibit D, contains a remark from Councilwoman Sharon Sayles-Belton, who stated that the Planning Commission's version of the ordinance "added design standards for prohibition of signs on Nicollet Mall..."

c. A memorandum to the Council member Sayes-Belton, and to Council member Tony Scallon, the authors of the ordinance, from James H. Helzter, former Executive Director of the Minneapolis Community Development Agency, attached hereto as Exhibit E, contains the following remarks concerning the proposed

design standards:

> "We further questioned the signage regulations for adult entertainment facilities only. Given the city's desire for neon and bright lights as expressed in the Hennepin Avenue RFP it would appear that the provision limiting size and location of signs is impermissibly aimed at the content of these signs, and, although the planning staff acknowledges there is precedent in the zoning code for this type of regulation."

d. A letter to Councilwoman Sayles-Belton from Allen Hyatt, the Assistant City Attorney who drafted the ordinance, a copy of which is attached hereto as Exhibit F, contains the following remarks concerning the sign restrictions:

> "Although Renton did not address design standards, other cases have and I believe design standards of the proposed ordinance meet constitutional standards, although it may be necessary to 'fine-tune' prior to the

effective date of the ordinance."

_____

Randall D.B. Tigue

Sworn to and
subscribed before
me this_____ day
of _____, 1994.

_____

Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Excalibur Group, Inc.,
a Minnesota corporation,

Plaintiff,
vs.

AFFIDAVIT OF STEPHEN POOR

City of Minneapolis,

File No.

Defendant.

STATE OF MINNESOTA)
)ss
COUNTY OF HENNEPIN)

Stepehn Poor, being first duly sworn, upon oath deposes and says:

1. I am a Zoning Inspector employed by the City of Minneapolis.

2. I have been employed by the City of Minneapolis since May, 1988. I have been employed in

my present capacity since April, 1993. Prior to my promotion to Zoning Inspector, I worked as Zoning Aide.

3. As part of the responsibilities of my present position, I enforce signage requirements of the Minneapolis Code of Ordinances, including Section 540.410(g).

4. In my above capacity I had occasion to issue a compliance letter to the above-named Plaintiff on March 10, 1994. A copy of that letter is attached hereto as Exhibit A.

5. Subsequent to the issuance of my March 10, 1994, letter, I was provided with a copy of the Memorandum Opinion and Order of the United States District Court in the above-captioned matter filed April 19, 1994. Thereafter, on May 5, 1994, I issued an amended compliance letter deleting any reference to Minneapolis Code of Ordianances Section 34.60(a)(1). A

true and accurate copy of my amended compliance letter is attached hereto as Exhibit B.

6. Since the time of the Court's Memorandum Opinion and Order filed Aprile 17, 1994, in the above-referenced matter the City of Minneapolis has taken no enforcement action against Plaintiff under Code or Ordinance Section 34.60(a)(1) nor am I aware of any action on behalf of the Plaintiff which would implicate the provisions of that ordinance.

Further your Affiant sayeth naught.

_____
Stephen Poor

Subscribed and sworn
to before me this____
day of_____,1994

_____
Notary Public

March 10, 1994

Exhibit A

Excalibur Group, Inc.
241 North 2d Avenue
Minneapolis, MN 55401

Dear Sir:

This letter serves as a notice of violation of Ch. 34.60 (a)(1) and 540.410 (g)(4).

As you are aware, this building is in the Historic Warehouse District and, therefore, requires the Historic Preservation Commission's approval prior to any internal signs being installed on the building.

Further, window signs are not permitted under 540.410 (g)(4). Please remove all window signs and Neon "X" from all windows, and remove all exterior signs (until HPC approval has been obtained) on or before March 24, 1994.

I will reinspect on March 25, 1994. Failure to comply with these orders may result in further action.

If you have any questions, call me at 612/673-5837 between 8:00 a.m. - 10:00 a.m.

Sincerely,

Stephen Poor
Zoning Inspector

May 5, 1994

Exhibit B

Dennis Buchanan
Excalibur Group, Inc.
241 2d Avenue North
Minneapolis, MN 55401

Dear Mr. Buchanan:

This letter serves as notice of violation of Section 540.410 (g)(3) and 540.410 (g)(4), and supersedes the letter dated March 10, 194 (see enclosed copy).

The window signs are in violation of Section 540.410 (g)(4). Please remove all neon "X" signs from the windows and the "Sex World" signs from the first floor windows. The display case containing adult sexual paraphernalia, visible from 2d Avenue North, is in violation of Section 540.410 (g)(3) (please find enclosed photocopy). This merchandise may not be seen from the sidewalk.

Please comply with these orders on or before May 15, 1994. I will reinspect this site on May 16, 1994. If you have any questions, call me at 612/673-5837.

Sincerely,

Steve Poor
Zoning Inspector

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Excalibur Group, Inc.,
a Minnesota corporation,

Plaintiff,
vs.

AFFIDAVIT OF JAMES A. MOORE

City of Minneapolis,

File No.

Defendant.

STATE OF MINNESOTA)
)ss
COUNTY OF HENNEPIN)

James A. Moore, being first duly sworn upon oath, deposes and says:

1. I am an Assistant City Attorney employed by Defendant, City of Minneapolis. I am licensed to practice law in the Court's of the State of Minnesota and before the United States District Court for the State of Minnesota and before the United States District Court for

the District of Minnesota. I am the attorney of record for the Defendant in the above-captioned matter.

2. Attached hereto and incorporated herein by this reference as Exhibit A is a true and accurate copy of Minneapolis Code of Ordinances Section 540.410.

3. Attached hereto and incorporated herein by this reference is a true and accurate copy of the City Council minutes and proceedings on file with the Minneapolis City Clerk pertaining the Minneapolis Code or Ordinances Section 540.410 during the calendar year 1986.

Further Affiant sayeth naught.

_____

James A. Moore

Subscribed and sworn
to before me this____
day of_____, 1995.

_____

Notary Public

Date: September 10, 1996

To: City Planning Commission

From: Staff

Subject: Regulation of Adult Uses

On September 10, 1986 the subject of regulating adult entertainment uses will be before the City Planning Commission in the form of a zoning ordinance change that would prohibit adult uses anywhere in the City except in the Downtown B4 zones. The ordinance change is a modification to the existing zoning ordinances regulating adult use locations.

Comparison of Existing Ordinance and Proposed Ordinance

The kinds of uses that are regulated does not change from those that are already regulated. These uses are adults-only bookstores and theaters, adult entertainment centers, massage parlors, rap parlors, and saunas. Each of these used is defined in the zoning code.

The places where adult theaters, bookstores, and entertainment centers are allowed to locate do change with the proposed ordinance. In the Downtown area the areas opine to adult uses are expanded. The accompanying map shows the existing and proposed boundaries. The Nicollet Mall has been removed from the area where adult businesses are prohibited. Also, the 500' spacing between adult uses has been dropped. The 500' distance requirement between residentially zoned districts and adult uses remains. There is also a

prohibition against adult uses within 500' of schools, churches, and day care centers.

Outside of the Downtown area, all adult uses would be prohibited.

The amortization concept is also about the same as the existing ordinance. It requires that uses in violation of the new ordinance be closed or relocate within about 3 years (July 1, 1988).

History of Adult Use Regulation

Highlights in the City's efforts to regulate adult businesses are shown below.

1976 - April	U.S. Supreme Court upholds Detroit regulation of adult theaters.
1977 - April	Council makes massage parlors, rap parlors, and other similar uses conditional use starting in the B3S zone.
1977 - May	Council adopts regulations on locations of all adult entertainment uses: 500' spacing, 500' prohibition near churches.
1982 -	Court of Appeals voided City's regulations as unconstitutional.
1983 -	Limits adult bookstore and theaters to an area Downtown, but not along the Nicollet Mall.

1985 - November Council defines adult entertainment center.

1986 - U.S. Supreme Court upholds Renton, Washington's adult use regulations. Court declares that this is not a First Amendment issue, but a use impact issue. Their ordinance is similar tot he Minneapolis regulation.

Public Purpose of Regulation

The purpose of the regulations is to control the adverse impacts on residentially zoned areas and the City's fragile strip and neighborhood commercial areas. The purpose does not include denying access to adult movies, bookstores, saunas etc. The public will have to seek these kinds of materials and services in the part of the City that is best able to withstand the adverse use impacts that come with them.

Most of the City's residential areas within 500' of commercial areas where adult businesses have located in the past. Several studies have been done in cities such as Seattle, Chicago, Los Angeles, Indianapolis and Portland, Oregon that document that adverse impacts of these businesses on surrounding areas. These studies have been made a part of the record on this issue and form the foundation for the controls of location in the proposed ordinance. Public testimony from neighborhood group representatives in Minneapolis will augment these sturdies in other cities and illustrate what the conditions are like in Minneapolis. Theses comments will also be made part of the record.

Space limitations in this report prevent staff from listing the findings in all the studies cited above. The Indianapolis report compared the study areas (areas around adult businesses) with control areas (similar areas, but with no adult businesses). The study found the following:

* Major crime was 23 percent higher in the study areas.

* Sex related crimes were almost twice as high in the study areas.

* Crime was actually higher in the residential areas near the adult businesses than it was in the commercial areas.

* Housing values in the study area appreciated at only one-half of the rate of the control areas.

* Property turnover was substantially higher in the study areas. "Twice as many homes were placed on the market at substantially lower prices than would be expected had the study area's market performance been typical for the period of time in question".

* Results from a national survey of real estate appraisers was that the effect on property values was greater for residential properties than for commercial properties.

* The survey also showed that 50 percent of

the appraisers felt that there would be substantial-to-moderate negative impact on property values. However, 30 percent saw little or no impact and 20 percent saw the effect as being dependent on other factors in the area such as development standards imposed on the use and the ability of the commercial area to buffer the impact from other uses.

This last finding is important because it provides the rationale for allowing these uses Downtown. The Downtown is best able to "buffer" the impact of adult uses on surrounding properties. This would be even more effective if design controls were included to control the appearance and image of adult businesses. Presently controls are not proposed. Staff will include recommendations for them in the following section.

Recommendation

Staff is generally in favor of the ordinance as it has been proposed. The City's residential and neighborhood and strip commercial areas need protection from these kinds of uses that erode the livability of the City. There is concern, however, that Downtown isn't as strong as it used to be and that forcing existing adult businesses to move Downtown may require substantially more public investment to ward off the effect of adult businesses. It does appear, however, that the City is making the kind of public investment in the Downtown area that will off-set the adverse impacts. The City seems committed to:

* Improving Hennepin Avenue
* Building a new convention center

* Building a convention hotel
* Building a river parkway and promenade
* Building a high technology corridor
* Doing Laurel Village
* Perhaps doing the LSGI project
* Saving the State Theater
* Rebuilding Nicollet Mall

Staff does recommend that standards and requirements for signs related to adult businesses be added to the ordinance. They should be added as follows:

Section 7. That a new subsection (g) of Section 540.410 of the above entitled ordinance be added as follows:

(9) Sign Requirements for all Uses. All new regulated uses, and all existing regulated uses by July 1, 1988, shall comply with the following sign requirements:

1) All signs shall be flat wall signs.

2) The amount of allowable sign area shall be one square foot of sign area per foot of lot frontage on a street
3) No merchandise or pictures of the products or entertainment on the premises shall be displayed in window areas or any area where they can be viewed from the sidewalk in front of the building
4) Window areas shall not be covered or made opaque in any way. No signs shall be placed in any window. A one square foot sing may be placed on the door to

state hours of operation and admittance to adults only

Staff is also not in favor of dropping the prohibition of adult use on the Nicollet Mall and the spacing limitation of 500' between uses. While staff does not want to recommend spacing limitations that would jeopardize the constitutionality of the ordinance, we do feel that there is potential from problems if the Nicollet Mall prohibition and some kind of spacing isn't included in the ordinance. Therefore, staff recommends two additional changes tot he ordinance as follows:

At the end of Section 1 add: "However, none of the above uses shall be permitted on any property with its main public entrance on Nicollet Avenue".

At the end of Section 2 add: "Only one of the above uses shall be allowed per block face."

This last limitation would allow four adult uses per block but only one per each block face. This is far less restrictive than a 500' limitation in all directions but seems to give adequate impact protection.

September 30, 1986

MEMORANDUM TO: Council Member Sharon Sayles Belton
Council Member Tony Scallon

FROM: James R. Heltzer

SUBJECT: Proposed Ordinance Relating to Adult Facilities

The current debate over the proposed ordinance limiting the location of so-called adult facilities is no -- and should not be seen as -- a battle between the neighborhood and downtown. In fact, both groups are united in their feelings that these facilities should be as severely limited as the courts will allow. No one in the neighborhood want to see every block face in downtown with one of these facilities located on it. Similarly no one in the business community wants Lake Street, Franklin Avenue or Broadway to be plagued forever with the types of problems these facilities seem to engender.

While the courts have repeatedly said that these facilities have the right to exist, they should be located where they are as unobtrusive and nondisruptive as possible. That is the basis for this ordinance, which would remove them from the neighborhoods and force them to locate in the B4 zoning district. Theoretically, this would allow these uses in both the core and periphery of them by the constraints contained in the ordinance. High rents will preclude their existence in the retail and office core, including the Nicollet Mall. Distance requirements from

churches, schools, and day care centers will add further limitations. In shore, the facilities will be forced to the peripheral of downtown, generally north of Hennepin Avenue or near the Metrodome.

The limitations already included in the ordinance and the realities of the marketplace have led my staff and me to candor additional limitations and exclusions. We propose that you consider the following:

A. Exclusion of the Warehouse Preservation District. Business people in the 1st Avenue North area have justifiable concerns that their area will be vulnerable to these adult facilities. This comes at a time when many of them have taken considerable risks and invested large amounts of capital to restore the warehouse area along 1st Avenue North and Washington Avenue. As a result of their efforts, the area has been re-born, a process which will be augmented with the construction of the peripheral parking ramps and significant development in the Hennepin Avenue Centrum.

Therefore, I would suggest that the Warehouse Preservation District be excluded from the proposed zone. This District, which was established in 1978 by the City Council, encompasses 1st Avenue North from Washington Avenue North to 6th Street North and then extends up Washington Avenue to about 3d Avenue North. Since this district was created well

in advance of the consideration of this ordinance, it could not likely be construed by the courts as being an arbitrary district designed only to keep pornography out.

B. Exclude Private as Well as Public Schools

The current ordinance sets a distance requirement of 500 feet between adult facilities and educational facilities serving persons 17 years of age and younger. While it may be that including private educational facilities would limit the area available for these adult uses, I do not believe we can -- or should -- set different standards in terms of this ordinance based on whether or not students pay tuition.

Additional Limitations to Ordinance

My staff and I have considered several additional limitations to the ordinance. While well-conceived and making sense from planning and zoning standpoints, we rejected them. We operated on the belief that adding too many exemptions, exclusions and limitations while perhaps strengthening the ordinance, would weaken out case in the courts.

An example of type of provision we looked at seriously, but then rejected was that of adding a parking requirement. While the requirement for off-street parking is in the code, presumably adult uses would locate in existing buildings, erected prior to 1963 and, therefore, would be exempt from the parking requirement. To add a parking provision would require uniform application to all new businesses regardless of their type. Otherwise, the

courts may reject such a requirement.
In fact, we questioned some of the provisions included in the proposed ordinance based on the same grounds. That is, would the courts consider them arbitrary exclusions or limitations? They are as follows:

A. Exclusion of the Nicollet Mall. There may be no legal basis for excluding these adult uses from the Mall. The ordinance considered by the Supreme Court in City of Renton v. Playtime Theaters, Inc. contained no similar exclusion. Such an exclusion may support an argument that the ordinance is impermissibly aimed at the "content" of speech.

B. Signage Regulations We further questioned the signage regulations for adult entertainment facilities only. Given the City's desire for neon and bright lights as expressed in the Hennepin Avenue RFP it is impermissibly aimed at the content of these signs although the planning staff acknowledges there is precedent in the zoning code of this type of regulation.

Building "A Record" on the Ordinance
Finally, we consider the building of a complete "record" as essential. Courts view regulation or suppression of speech differently from regulation of the time, place and manner in which speech takes place. The ordinance being proposed needs to be characterized as one regulating time, place and manner rather than one regulating or

suppressing speech because of its content. A court will look to this record to determine whether this ordinance is an impermissible burden on speech.

We recommend that in addition to Zoning and Planning Committee, the Community Development Committee consider this ordinance as a "development" matter. If possible and not duplicative of testimony before Z&P, testimony from members of the community concerning the spin-off effects of adults-only establishments would be appropriate. The CD Committee should take notice of the record developed before Z&P, including studies done in other cities concerning the effects of these activities o crime rates, retail trade, neighborhoods and the overall quality of urban life.

Conclusion

The overall thrust of the proposed ordinance is very good. It is important, however, to recognize and include every legitimate exception possible, including the Warehouse Preservation District and private educational facilities. It is equally important to look closely at the closely at the current provision of the ordinance to ensure that we are meeting the tests set forth by the courts.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

****

STATE OF MINNESOTA,

Plaintiff, SIP NO. 94071816

vs. TRANSCRIPT OF PROCEEDINGS

LARRY A. HOLMBERG,

Defendant.

****

The above-entitled matter came on for trial before the Honorable Andrew W. Danielson, one of the judges of the above Court, on May 16, 1995, at 9:30 a.m., in Courtroom C-1957 of the Hennepin County Government Center.

APPEARANCES

STEVEN FREDRICKSON, Assistant City Attorney, appeared on behalf of the State.

RANDALL D.B. TIGUE, Esq., appeared on behalf of Defendant.

LARRY A. HOLMBERG, Defendant, was present.

RALPH KRASKY, Court Reporter.

We will be offering a number of photographs that will show the property in question and will show the signs that were present on July 6, 1994, the date the photographs were taken, and Inspector Poor from the zoning office will testify about the merchandise that he was able to see through the windows on that date.

THE COURT: Okay. Mr. Tigue, anything at this time?

MR. TIGUE: I will waive opening statement, Your Honor.

THE COURT: Okay. Mr. Fredrickson, you may proceed.

MR. FREDRICKSON: I call Inspector Steve Poor.

Whereupon,

STEVEN POOR,

a witness called on behalf of the State,

having been first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FREDRICKSON:

Q. Are you employed by the City of Minneapolis?

A. Yes.

Q. How long have you worked for the City of Minneapolis?

A. Oh, let's see, my current capacity in the zoning office, I believe I have worked there five years.

Q. And have you worked in any other capacity for the city?

A. I was an intern with the City of Minneapolis while I was in college at the University of Minnesota prior to that.

Q. What did you study at the University of Minnesota?

A. Geography and Urban Studies.

Q. Did you receive a degree from the institution?

A. No. I was just a few credits short when I got married. I have been working for the city since then.

Q. What is your present job title?

A. Zoning Inspector.

Q. What are your duties?

A. My duties as a zoning inspector are to enforce the zoning code, enforcement officer for the Department of Inspections on zoning issues. I also previously was a sign inspector for the city. My title then was zoning aide-1, but I had all the responsibilities for sign inspection, issuing permits, et cetera, for the city of Minneapolis, and I still fulfill those duties as well as any zoning inspector job.

Q. Does the Minneapolis Zoning Code regulate adult usage in the City of Minneapolis?

A. Yes, it does.

MR. FREDRICKSON: Your Honor, I have a copy of the zoning ordinance in question. Would you like to have it marked and offered as an exhibit?

THE COURT: Would I like to? Well, if you want to.

MR. FREDRICKSON: It might be helpful.

THE COURT: Go ahead.

(State's Exhibit I marked for identification.)

BY MR. FREDRICKSON:

Q. Inspector, I show you what has been marked for identification as State's Exhibit Number 1. Do you recognize that?

A. Yes, I do.

Q. Is it a copy of the zoning ordinance, Minneapolis code, ordinance 540.410?

A. Yes, it is.

Q. Is that a multi-page document that yo have?

A. Yes, it is.

Q. Would you take a moment to review it and see if that is an accurate copy of the zoning law as was in effect on July 6, 1994?

A. Certainly. Yes, to the best of my knowledge, this would be the same as was used in '94.

MR. FREDRICKSON: I show this then to counsel.

MR. TIGUE: I have no objection.

THE COURT: One will be received.

BY MR. FREDRICKSON:

Q. Were you working in the zoning department in 1994?

A. Yes, I was.

Q. On or about June 9 of 1994, did your official duties take you to the property located at 257 Third Avenue South in Minneapolis?

A. Yes, to the best of my recollection, that is correct.

Q. And does that property also include the street address of 300 to 308 South Third Street in Minneapolis?

A. Yes, as well as even on the older records it goes back as an address of Third Avenue. It is on a corner and has several entrances, so there has been a point of confusion in the past, but yes, that is correct.

Q. So the property is essentially located on the corner of Third Street and Third Avenue South in Minneapolis?

A. Yes, be on the northeast corner of that intersection.

Q. Is that property located within Hennepin County, Minnesota?

A. Yes, It is.

Q. When you inspected the property on June 9, 1994, what, if anything, did you observe that attracted your attention to your official duties?

A. Well, it had -- I would like to say that I received

complaints about it which is probably--.

MR. TIGUE: Objection to that as nonresponsive.

THE COURT: Sustained.

THE WITNESS: At any rate, they had numerous signs that were in the windows and that is against the Chapter 540.410.

MR. TIGUE: I will object to the conclusion that it is against 540.410.

THE COURT: Sustained. Tell us what you saw.

BY MR. FREDRICKSON:

Q. Just describe what you saw.

A. Number of signs in the windows. There was a neon sign that said "Open" and there was paper pasted up on the insides of the windows which I deemed to be opaguing of the windows. It is covering them. So I wrote that up

as a violation. The cracks in the windows--you could see illicit adult materials with glosses, covers showing women's genitals and body parts, including male body parts in a turgid state penetrating women in their various orifices. I determined that to be seeing adult material from the sidewalk so I wrote that up as well as seeing merchandise from the street.

Q. You observed these conditions--or as a result of observing these conditions, did you prepare a letter serving a notice of a violation?

A. Yes, that is correct.

(State's Exhibit 2 marked for identification.)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
NO. 96-1098

Excalibur Group, Inc.
a Minnesota corporation,

Appellant,

vs.

City of Minneapolis, a
municipal corporation,

Appellee.

APPELLANT'S PETITION FOR REHEARING WITH A SUGGESTION OF REHEARING EN BANC

The above-named Appellant, by the undersigned, hereby moves this Court, pursuant to Rule 25 of the Federal Rules of Appellate Procedure, for a rehearing in the above-entitled matter, with a suggestion for rehearing en banc.

I ex[press] a belief, based on a reasoned and studied professional judgment, that the decision in the above-entitled matter is contrary to the following decisions of the United States Court of Appeals for the Eighth Circuit and the Supreme Court of the United States; Gilleo v. City of LeDue, 986 F. 2d 1180 (8th Cir. 1993), aff'd, 114 S. Ct. 2038 (1994); 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, (1996); Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995); Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975), and that consideration by the full court is necessary to cure and maintain uniformity of decisions in this Court: See cases cited, supra.

I further express a belief, based on a reasoned and professional studied judgment, that this appeal raises that following questions of exceptional importance:

a. Is it permissible for a federal court to

defer to legislative judgment on regulation of First Amendment rights, be it a time, place, and manner regulation of non-commercial speech, or a regulation of commercial speech, in the absence of any evidence in the record that the regulation will significantly advance a governmental interest or is narrowly tailored to serve that interest.

b. Can an overbreadth analysis, otherwise constitutionally compelled, be avoided by labeling as commercial speech otherwise constitutionally protected material such as books, magazines, and video tapes, merely because they are commercially sold?

The foregoing motion shall be based upon the attached memorandum of law, and upon all of the files, records and proceedings herein.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
NO. 96-1098

Excalibur Group, Inc,.
a Minnesota corporation,

Appellant,

vs.

City of Minneapolis, a
municipal corporation,

Appellee,

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REHEARING EN BANC

FACTS

The above-entitled action is a challenge to the facial constitutionality of Minneapolis Code of Ordinances Section 540.410(g), which provides, in pertinent part as follows:

"All new regulated uses,[8] and all existing regulating uses by December 1, 1988, shall comply with the following sign requirements:

...(3) No merchandise or pictures of the product or entertainment on the premises shall be displayed in the window area or any area where they can be viewed from the sidewalk in front of the building.

(4) Window areas shall not be covered or made opaque in any way. No signs shall be placed in any window. Once square foot sign may be placed on the door to state hours of operation and admittance to adults only."
Appellant's Appendix at A. 46.

Several observations are readily apparent from the face of the ordinance:

First of all, if an adult bookstore renders its

[8]The term "regulated uses" refers to the general adult entertainment uses regulated by Section 540.410, enumerated in subparagraph (A) and more specifically in subparagraph (b) of the ordinance. Regulate uses include adults-only bookstores, adults-only motion picture theaters, massage parlors, rap parlors, saunas, and adult entertainment centers. Appellant's Appendix at A.43-44.

windows opaque, so as to prevent minors from seeing sexually explicit merchandise inside, the adult bookstore commits a crime under subparagraph (4). If, on the other hand, the adult bookstore obeys Subparagraph (4) by making its windows transparent, and if a person can therefore see merchandise from a sidewalk in front of the building, the store commits a crime under Subparagraph (3).[9] Secondly, the restriction as to merchandise or pictures or entertainment being visible from the sidewalk is not limited to material which is legally obscene, harmful to minors, or even sexually explicit.

Finally, it should be noted, that under the plain language of the ordinance while placing a sign in the window would constitute a criminal offense, placing the

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[9]This was not speculation or conjecture. The record before the trial court plainly indicated that another adult bookstore was, in a single prosecution, criminally prosecuted for making his windows too opaque, by putting a sign in them, and also for not making them opaque enough, since someone looking around the edge of the sign could see merchandise inside the store. See Appellant's Appendix at A.184 - A.192.

identical sign on the wall is absolutely permissible.

The entirety of the legislative history supporting these rather bizarre provisions is the following:

A report of the City Planning Commission, dated September 25, 1986, adopts a report from its staff, dated September 10, 1986, which report justifies the sign restrictions as "design controls" and states that said controls "were included to control the appearance and image of adult businesses";[10] secondly, the minutes of the Standing Committee on Zoning and Planning contain a remark from then Councilwoman Sharon Sayles Belton, who stated that the Planning Commission's version of the ordinance "added design standards for prohibition of signs on Nicollet Mall...."[11] thirdly, a memorandum to Council member Sayles-Belton and to Council member Tony

[10]Appellant's Appendix at A.86.

[11]Id. at A.78.

Scallon, the authors of the ordinance, from James H. Heltzer, former Executive Director of the Minneapolis Community Development Agency, dated September 30, 1986, which contains the following assessment of the sign regulation:

> "We further questioned the signage regulations for adult entertainment facilities only. Given the City's desire for neon and bright lights as expressed in the Hennepin Avenue RFP, it would appear that the provision limiting the size and location of signs is impermissibly aimed at the content of these signs, although the planning staff acknowledges there is precedent in the zoning code for this type of regulation."[12]

Finally, a letter to Sayles Belton from Allen Hyatt, the Assistant City Attorney who drafted the ordinance, contains the following remarks concerning the sign restriction:

> "Although Renton did not address design standards, other cases have and I believe designs standards of the proposed ordinance

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[12] Id. at A.119.

> meet constitutional standards although it may be necessary to 'fine-tune' prior to the effective date of the ordinance."[13]

Conspicuous by its absence from this legislative history is any showing or discussion, much less affirmative evidence, that opaque windows in adult bookstores cause adverse secondary effects not caused by opaque windows in a B. Dalton Bookstore, or that any adverse secondary effects are caused by signs placed in windows of adult bookstores that are not caused by the identical signs placed on a wall. On this record, it is clear that the panel's upholding of the validity of these provisions is in clear conflict with decisions of both this Court and the United States Supreme Court.

ARGUMENT

I. THE PANEL'S FINDING THAT THE SIGN REGULATIONS IN QUESTION ARE NARROWLY TAILORED TO SERVE A SUBSTANTIAL GOVERNMENTAL INTEREST IS DIRECTLY

[13] Id. at A.151.

CONTRARY TO PRIOR DECISIONS OF THIS COURT AND THE UNITED STATES SUPREME COURT.

In upholding the validity of on the prohibition of opaque windows and on placing signs in windows, the panel wrote:

> "We disagree that the sign and window restrictions are unreasonable. The City could reasonably have concluded that leaving the windows free of signs and coverings would enhance the outward appearance of, and therefore minimize the adverse effects caused by, sexually oriented businesses. Further, the City's regulations are not inconsistent, because Excalibur could avoid the visibility of its merchandise through unobstructed windows by turning its display stands so the merchandise does not face the windows (footnote omitted). More importantly, and to the point, we believe Excalibur invites us to strike down the City's means of furthering its objections, simply because the means may be imperfect. We decline this invitation. Although reasonable people might quibble about the extent to which the regulation serves the City's significant interest, or whether a better solution might be available, Section 540.410(g)(4) is reasonably related to the City's significant objectives, and therefore, 'narrowly tailored' as that term of art is

used in this context. [Citation omitted.]" Slip opinion at pp. 11-12.

This conclusion is plainly inconsistent of the decisions of both this Court and the United States Supreme Court.

It is plainly inconsistent with the decision of this Court in Gilleo v. LaDue, supra, 986 F. 2d 1180 (8th Cir. 1993), aff'd, 114 S.Ct. 2038 (1994), in which this Court adopted the following tests for determining the validity, under a "secondary effects" analysis of sign regulations:

> "Ladue asserts its ordinance is aimed only at preventing adverse secondary effects caused by an over-abundance of signs in the community. The secondary effects identified by Ladue include visual blight, unsafe conditions, and decreased property values.
>
> Assuming arguendo that the 'secondary effects' doctrine extends to cases involved prohibition of political signs on private property (footnote omitted), Ladue fails at sufficiently supporting its secondary effects argument. Specifically, Ladue has not shown that the prohibited signs cause more aesthetic, safety and property value

> problems than the permitted signs. Stated in other words, the prohibited signs are no more associated with the particular 'secondary effects' than many of the permitted signs. [Footnote and citation omitted.] Ladue has 'singled out' certain categories of signs for discriminatory treatment. The fact that the ordinance's differential treatment does not correlate with Ladue's interest in eliminating secondary effects undermines Ladue's commitment to its secondary-effects justification and supports the content that the ordinance is aimed at the contents of the signs. [Citation omitted.] In short, the ordinance's sign exceptions, many of which caused the same secondary effects as the prohibited signs, renders the secondary effects inapposite to this case." Id. at 1183.

Plainly, under the Gilleo standard, the sign regulations in the instant case can be upheld only upon a showing that there are adverse secondary effects associated with the prohibited signs (signs in windows and opaque windows at adult bookstores) that are not associated with permitted signs (the identical signs on walls and opaque windows at B. Dalton Bookstores). To

uphold the validity of these provisions in the absence of such a showing is plainly inconsistent with Gilleo and merits consideration by the full court.[14]

Contrary to the panel opinion, this is simply not a matter of the regulation being "imperfect"; it is a matter of the City's total failure to make any showing that the regulation would have any effect on its stated goals whatsoever. In this regard, it makes little difference whether the regulation is deemed a regulation of commercial speech as far as it concerns the bookstore's advertising, or a time, place, and manner regulation of non-commercial speech. The tests involved are extremely

[14]Indeed, the disparity with Gilleo is even more exacerbated by the panel's suggestion of resolving the bookseller's dilemma of committing a crime whether it has opaque or transparent windows under the ordinance. The panel suggests this dilemma could be alleviated by the bookseller pushing the back end of a bookshelf up against the window, so only the back end of the bookshelf is visible. There is obviously also no evidence anywhere in the record that an adult bookstore where only the backside of a bookshelf is visible from the window causes any adverse secondary effects or even would have its "outward appearance" enhanced, as opposed to an adult bookstore whose windows were tastefully painted opaque.

similar.[15] In both cases, the regulation must serve a substantial governmental interest and be narrowly tailored to serve that interest. The panel's assertion that, even in the absence of any evidence in the record that those standards have been met, this Court is obligated to defer to the legislative determination and not "quibble to which the regulations serve the City's significant interest" are directly contrary to a series of recent decisions of the United States Supreme Court.

For example, in Rubin v. Coors Brewing Co., 115 S.Ct. 1535 (1995), the Court discussed its earlier decision

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[15] Compare Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y., 447 U.S. 557, 100 S. Ct. 2343, 65 L.Ed. 2d 341 (1980), permitting regulation of commercial speech provided that the speech concerned lawful activity and not be misleading, that the governmental interest at stake be substantial, that the regulation directly advance the governmental interest asserted, and that the regulation not be more extensive than necessary to serve that interest, with City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed. 2d 29 (1986), and Ward v. Rock Against Racism, 491 U.S. 781 (109 S.Ct. 2746, 105 L.Ed. 2d 661 (1989), permitting time, place, and manner regulation upon a showing that the regulation is justified without reference to the content of regulated speech, that the regulation is narrowly tailored to serve a substantial governmental interest, and that the regulation leave available ample alternative avenues of communication.

in Edenfeld v. Fane, 113 S.Ct. 1792 (1993), and stated the following:

> "In Edenfeld, [Citation omitted.], we decided that the government carries the burden of showing that the challenged regulation advances the Government's interest 'in a direct and material way' [Citation omitted.] That burden 'is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. [Citation omitted.] We cautioned that this requirement was critical; otherwise 'a state could with ease restrict commercial speech in the service of objectives that could not themselves justify a burden on commercial expression. [Citation omitted.]"

More recently, in 44 Liquormart, Inc. v. Rhode Island, the United States Supreme Court considered the application of the long-standing test for judging the validity of a government regulation of commercial speech, a test virtually identical to the test adopted for judging the

sufficiency of a time, place, and manner regulation of non-commercial speech, such as adult entertainment, under Renton. As was the case in Renton and its progeny, the United States Supreme Court had long held that courts were to defer to legislative judgment as to the substantiality of the governmental interest and whether the regulation was narrowly tailored to serve those interests. See, for example, Posadas de Puerto Rico Associates v. Tours and Co. of P.R., 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed. 2d 266 (1986). However, in 44 Liquormart, the United States Supreme Court expressly overruled Posadas, to the extent that it required courts to defer to legislative determination as to the substantiality of a governmental interest and on the issue of narrow tailoring. The plurality opinion, written by Justice Stevens, stated the following:

> "The reasoning in Posadas does support the State's argument, but, on reflection, we are

now persuaded that Posadas erroneously performed the First Amendment analysis. The casino advertising ban was designed to keep truthful, non-misleading speech from members of the public for fear they would be more likely to gamble if they received it. As a result, the advertising ban served to shield the State's anti-gambling policy from public scrutiny that more direct, non-speech regulation would draw. [Citation omitted.]

Given our long standing hostility to commercial speech regulation of this type, Posadas clearly erred in concluding that it was 'up to the legislature' to choose suppression over a less speech-restrictive policy. The Posadas majority's conclusion on that point cannot be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, non-misleading advertising when non-speech related alternatives were available. [Citations omitted.]

Because the 5-to-4 decision in Posadas marked such a sharp break from our prior precedent, and because it concerned a constitutional question about which this Court is to be the final arbiter, we decline to give force to its highly deferential approach. Id. at 1511.

In her concurring opinion, joined in by three other

justices, Justice O'Connor likewise rejected, for commercial speech cases, the Posadas conclusion that courts were required to defer to legislative judgment on the issue of the substantiality of the governmental interest, whether the regulation advanced that interest, and whether the regulation was narrowly tailored to serve that interest. Justice O'Connor's concurring opinion stated:

> "Respondents point for support to Posadas de Puerto Rico Associates v. Tours and Co. of P.R., [Citation omitted], where, applying the Central Hudson test, we upheld the constitutionality of a Puerto Rico law that prohibited the advertising of casino gambling aimed at residents of Puerto Rico, but permitted such advertising aimed at tourists.
>
> The Court there accepted as reasonable the legislature's belief that the regulation would be effective, and concluded that, because the restriction affected only advertising of casino gambling aimed at residents of Puerto Rico, not that aimed at tourists, the restriction was narrowly tailored to serve Puerto Rico's interest. [Citation omitted.] The Court accepted without question Puerto Rico's account of the effectiveness

and reasonableness of its speech restriction. Respondents ask us to make a similar presumption here to uphold the validity of Rhode Island's law.

It is true that Posadas accepted as reasonable, without further inquiry, Puerto Rico's assertions that the regulations further the government's interest and were no more extensive than necessary to serve that interest. Since Posadas, however, this Court has examined more searchingly the state's professed goal, and the speech restriction put into place to further it, before accepting a state's claim that the speech restriction satisfies First Amendment scrutiny. [Citations omitted.] In each of these cases, we declined to accept at face value the proffered justification for the State's regulation, but carefully examined the relationship between the asserted goal and the speech restriction used to reach that goal. The closer look that we have required since Posadas comports better with the purpose of the analysis set out in Central Hudson, by requiring the State to show that the speech restriction directly advances its interest and is narrowly tailored. Under such a closer look, Rhode Island's price-advertising ban clearly fails to pass muster." Id. at 1522, O'Connor, J. concurring.

Consequently, since 44 Liquormart, the United

States Supreme Court, whether under the Stevens plurality opinion, or the O'Connor concurrence, has now said it will "carefully examine" the substantiality of a governmental interest, the evidence relied upon by the government to establish that the regulation substantially advances that interest, and the assertion that the regulation is narrowly tailored to serve that interest.

Plainly, under this heightened level of judicial scrutiny, the virtually non-existent showing contained in the instant case that the regulations involved will in anyway advance any type of substantial governmental interest, cannot conceivably pass constitutional muster. As a result, this Court should grant rehearing en banc to bring the panel's decision in conformance with the clear mandates of the United States Supreme Court.

II. THE PANEL'S DECISION UPHOLDING THE DISPLAY PROVISION AGAINST AN OVERBREADTH CHALLENGE IS DIRECTLY CONTRARY TO NUMEROUS DECISIONS OF THE

UNITED STATES SUPREME COURT AND SHOULD BE CORRECTED.

As already noted, supra, Minneapolis Code of Ordinances Section 340.410(g)(3) absolutely prohibits the display of any merchandise for sale on an adult bookstore, regardless of whether that merchandise is obscene, harmful to minors, or even sexually explicit. Plainly such a regulation is unconstitutionally overbroad under the decision of the United States Supreme Court in Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed. 2d 125 (1975).[16] The panel avoided this clearly mandated result by asserting that the Minnesota Court of Appeals in State v. Holmberg, 545 N.W. 2d 65, 70 (Minn. App. 1996), authoritatively construed the term to be

[16]In Erznoznik, the United States Supreme Court invalidated a city ordinance prohibiting the display of even "nudity" at a drive-in theater. If a regulation prohibiting the public display of mere nudity is unconstitutionality overbroad, then certainly one that prohibits the display of any merchandise sold in an adult bookstore, regardless of its level of explicitness, is, if anything, even far more overbroad.

limited to commercial speech and sexually explicit speech, which are entitled to a lesser measure of constitutional protection. Slip opinion at pp. 15-16.

There are three fundamental flaws with the argument:

Even apart from the fact that federal courts lack the authority to construe state statutes or city ordinances to preserve their constitutionality.[17] And apart from the fact that nothing in the Holmberg decision supports such a purported "narrowing construction,"[18] such a construction could not salvage the statute from an overbreadth challenge.

First of all, to the extent that the Minnesota Court

---

[17] See United States v. 12 200-foot Reels, 413 U.S. 123 (1973).

[18] The panel relies upon the Court's language at 545 N.W. 2d at 70, in which it dismisses the overbreadth challenge by asserting that commercial speech and sexually explicit speech are entitled to a lesser measure of constitutional protection than is other speech. However, no where in that discussion does the Minnesota Court of Appeals authoritatively construe the statute in such a limiting manner.

of Appeals in Holmberg and the panel dismissed the restriction as one directed to "commercial" speech, it is directly contrary to at least two decisions of the United States Supreme Court. The ordinance focuses on the display of "merchandise or pictures of the product or entertainment on the premises." Thus it focuses not on speech which proposes a commercial transaction but upon the fact that the books, magazines, and video tapes are displayed publicly for sale. The United States Supreme Court has repeatedly held that the fact that otherwise constitutionally protected material, such as books, magazines, and films are available for sale does not convert them into "commercial speech." In New York Times, Co. v. Sullivan, 376 U.S. 254, 266, 84 S.Ct. 710, ll L.Ed. 2d 698 (l964), the Court held that a paid political advertisement was not "commercial speech," stating, "that the Times was paid for publishing the advertisement is

immaterial in this connection as is the fact that newspapers and books are sold." In doing so, the Court relied upon its earlier decision in Smith v. California, 361 U.S. 147, 80 S.Ct. 215 (4 L.Ed. 2d 205 1960), an obscenity prosecution directly involving sexually explicit speech. In that case, the Court stated, "It is of course no matter that the dissemination takes place under commercial auspices. [Citation omitted.] Certainly, a retail bookseller plays a most significant role in the process of distribution of books." 361 U.S. at 150, 4 L.Ed. 2d at 209.

Consequently, to the extent that the prohibition affects display of merchandise otherwise available for sale, a commercial speech analysis is plainly inappropriate under the controlling decisions of the United States Supreme Court.

Secondly, even a restriction of the applicability of the ordinance to "sexually explicit" speech would

nonetheless be unconstitutionally overbroad. Plainly "sexually explicit" speech may involve mere nudity, something plainly entitled to constitutional protection, even in a display context. See Erznoznik, supra, and Jenkins v. Georgia, 418 U.S. 153, 181 (1974). Plainly, in order to pass constitutional muster, any prohibition against the display of sexually explicit material must, as a matter of law, be restricted to material which is legally obscene under Miller v. California, 413 U.S. 15 (1973), or "harmful to minors," under Ginsberg v. New York, 390 U.S. 629 (1968), and Upper Midwest Bookseller's Association v. City of Minneapolis, 780 F. 2d 1389 (8th Cir. 1989).

Finally, it should be noted that a construction of the ordinance narrowing it to material deemed "harmful to minors" would plainly be inconsistent with the legislative intent. At the time the provision was enacted

in 1986, display of material deemed "harmful to minors" was already prohibited under the very ordinance upheld in Upper Midwest Booksellers, supra. Consequently, it is clear that the City Council, in enacting Section 540.410(g)(3) plainly intended to go beyond that ordinance in enacting the present prohibition.

CONCLUSION

For all of the foregoing reasons, a rehearing should be granted, preferably en banc, and the panel's decision made consistent with prior decisions of both this Court and the United States Supreme Court.

Respectfully submitted,

Randall D. B. Tigue
Attorney for Plaintiff
2620 Nicollet Avenue
Minneapolis, Minnesota 55408
(612) 874-9903

Dated: July 7, 1997.

MINUTES

STANDING COMMITTEE ON ZONING AND PLANNING

SEPTEMBER 30, 1986

PRESENT: COUNCIL MEMBERS SAYLES BELTON, SCALLON, O'BRIEN, COYLE, CARLSON - 5.

Council Member Sayles Belton, Chair, called the meeting to order at approximately 1:52 p.m., this date, in Room 319 City Hall, a quorum being present with Sayles Belton, Coyle and Carlson - 3.

PUBLIC HEARING ITEMS

RECOMMENDATIONS FROM PLANNING COMMISSION

Zoning Code Text Amendment - PETN NO 240399
Amending Title 20, Chap 540 240405, 240406
of the Mpls Code of Ordns 240407, 240404
relating to Zoning Code: 240408, 240530
Business Districts, location 240703, 240705
restrictions on adults-only
bookstores, adults-only
motion picture theaters,
and adult entertainment
centers, Planning Commission
apprvd amended version
of Ordn.

Sharon Sayles Belton said that the Planning Commission added design standards for prohibition of signs on Nicollet Mall, and that there was an additional prohibition for the library.

Council Member Sharon Sayles Belton
Chair
Standing Committee on Zoning and Planning Minneapolis City Council
Room 307 City Hall
Minneapolis, MN 55415

Re: Proposed Amendments to Section 450.410 of the Zoning Code of the City of Minneapolis

Dear Council Member Sayles Belton:

You have asked that we make a comprehensive review of the above-referenced proposed amendments and that based upon such review I make recommendations to your committee.

(3) Although Renton did not address design standards, other cases have and I beleive design standards of the proposed ordinance meet constitutional standards, altrhogh it may be necessary to "fine-tune" them prior to the effective date of the ordinance.